No. 05-561

IN THE

Supreme Court of the United States

MICHAEL WIRZBURGER, ET. AL.,
Petitioners,

v.

WILLIAM F. GALVIN, ET. AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
ERIC C. RASSBACH
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
Phone: (202) 955-0095

Counsel for Petitioners
*Counsel of Record

QUESTIONS PRESENTED

1. Whether this Court should resolve the conflict among courts of appeals over the proper level of scrutiny under the Free Speech Clause of content-based censorship of political expression in state initiative processes.

2. Whether nativist state constitutional provisions that uniquely prohibit citizen initiatives from either touching on religion in general or addressing funding for religious schools in particular fail the constitutional requirement of neutrality under the Free Exercise Clause and Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioners, Michael Wirzburger, Susan Wirzburger, Rita Zubricki and Elizabeth Zubricki were the plaintiffs-appellants below. Respondents were defendants-appellees below and are Massachusetts state officials: William F. Galvin, Secretary of the Commonwealth of Massachusetts, Mitt Romney, Governor of the Commonwealth of Massachusetts, David P. Driscoll, Commissioner of Education of the Commonwealth of Massachusetts, Timothy P. Cahill, Treasurer and Receiver General of the Commonwealth of Massachusetts, Tom Reilly, Attorney General of Massachusetts, and James A. Peyser, Chairman of the Massachusetts Board of Education.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

No. 05-____

MICHAEL WIRZBURGER, ET. AL.,
Petitioners,

v.

WILLIAM F. GALVIN, ET. AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Michael Wirzburger, Susan Wirzburger, Rita Zubricki, and Elizabeth Zubricki respectfully petition for a writ of certiorari to review the judgment of the United States Court Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit is reported at 412 F.3d 271. Appendix ("App.") at 1a. The opinion of the United States District Court for the District of Massachusetts is reported at 311 F. Supp. 2d 237. App. 25a.

JURISDICTION

The First Circuit's judgment was entered on June 24, 2005. App. 1a. On July 21, 2005, the First Circuit denied panel rehearing. App. 59a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." *Id.*, amend. XIV.

The relevant provisions of the Massachusetts Constitution are set out in the appendix. App. 60a-63a.

INTRODUCTION

At the zenith of their power in Massachusetts, the Know-Nothings in 1855 passed an Anti-Aid Amendment to the Massachusetts Constitution that allowed state funds to support Protestant Christian religious instruction in the public schools, but prohibited the Commonwealth from funding private Catholic schools. In 1917, as nativist forces sensed their political power was on the wane, they pulled up the ladder, amending the constitution with a pair of exclusions that made it impossible for Massachusetts citizens to use the initiative process to roll back the nativist parts of their commonwealth's Constitution.

Since then, Massachusetts has selectively enforced the Anti-Aid Amendment, applying it *exclusively* against its original target—private schools (which remain predominantly religious and Catholic today). Petitioners sought to change the Anti-Aid Amendment through the

citizen initiative process to allow indirect aid to flow to religious schools, but were prevented from doing so by the 1917 initiative exclusions.

Although the motivations of the individual state actors may have changed over the years, the intent and effect of Massachusetts' constitutional provisions have remained the same: to single out for disapproval one viewpoint and one group of people. Just as this Court does not suffer vestigial Jim Crow laws to be used today to prohibit political speech and enable discrimination, *see, e.g., Hunter* v. *Underwood*, 471 U.S. 222, 232-33 (1985), so too it should make clear that enforcing nativist laws to limit speech and discriminate between groups offends the Constitution.

This Court should also grant the writ to mend the widening split among courts of appeals over what level of scrutiny to apply to content-based censorship of political expression in the initiative process.

STATEMENT OF THE CASE

1. Petitioners' initiative attempt. Petitioners Susan Wirzburger and Rita Zubricki send their children to Catholic schools in Massachusetts, where they can receive a religious education unavailable in public schools. App. 2a. This case concerns Petitioners' attempt to use Massachusetts' initiative process to effect political change to their advantage, by allowing public educational funds to follow needy students to religious schools, thus reducing the burden Petitioners face in paying for both a religious education and public, non-religious schools. Petitioners tried to modify by initiative a provision of Massachusetts' constitution known as the Anti-Aid Amendment[1] that

[1] MASS. CONST. amend. art. XVIII. App. 60a.

prevents any public funds from ending up at private schools, even indirectly.[2]

Specifically, on July 28, 1999, Petitioner Wirzburger, along with fourteen others, submitted an initiative petition to the Attorney General to modify the Anti-Aid Amendment by adding a sentence stating that nothing in the Anti-Aid Amendment shall prevent the Commonwealth from providing loans, grants, or tax benefits to students attending private schools, regardless of the schools' religious affiliation. App. 3a.

On September 1, 1999, Attorney General Reilly denied certification of that petition because of the content of its speech. App. 54a. The Attorney General cited parts of § 2 of Article 48 of the Massachusetts constitution, which bars from the initiative process any initiatives relating to religion (the "Religious Exclusion")[3] and any initiatives seeking to change the Anti-Aid Amendment (the "Anti-Aid Exclusion").[4]

Petitioners sought relief in federal court. On September 2, 1999, the district court ordered the Attorney General to release a summary of their initiative petition to Secretary of the Commonwealth William Galvin and ordered Galvin to release blank petition forms to the Petitioners and take all other steps he would have been required to take had the petition been certified. Petitioners were given signature forms, and they gathered more than 80,000 signatures. On

---

[2] Massachusetts' general education private schools are overwhelmingly religious.

[3] The Religious Exclusion provides that "no measure that relates to religion, religious practices, or religious institutions ... shall be proposed by an initiative petition." App. 62a.

[4] The Anti-Aid Exclusion provides: "Neither the eighteenth amendment of the constitution [i.e., the Anti-Aid Amendment], ... nor this provision for its protection, shall be the subject of an initiative amendment." App. 62a.

December 15, 1999, Secretary Galvin informed them that they had submitted enough properly certified signatures.

Accordingly, consistent with the court's order, Galvin transmitted their petition to the Massachusetts legislature. App. 46a. The Counsel to the Senate sent a letter to the Senate Clerk stating that the Clerk should take no action on the petition, relying on the Attorney General's earlier conclusion that the Religious and Anti-Aid Exclusions required censoring the political expression in the initiative. App. 47a. The Senate Counsel concluded that "so long as this determination by the Attorney General remains in force, I advise you to take no further action with respect to this initiative petition." *Id.* The joint session of the Legislature declined to act on Petitioners' initiative petition, and it therefore died as a result of the barrier posed by the Exclusions.[5]

2. History of the Amendments. Evaluating this Petition requires knowledge of the history of purposeful unequal treatment of which the Anti-Aid Amendment and the Exclusions are part and parcel.

a. History of the Anti-Aid Amendment

i. The Anti-Aid Amendment Targeted Catholics

The Anti-Aid Amendment was added to the Massachusetts constitution in 1855 at the height of the Know-Nothings' power. *See* Joseph. V. Viterriti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 667 n.42, 669 (1998); Richard Fossey & Robert LeBlanc, *Vouchers for Sectarian Schools after Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts Constitution?*, 193 West's Educ. L. Rep. 343, 358-59 (Jan. 13, 2005). It provided that "moneys raised by taxation . . .

---

[5] Under Massachusetts' constitution, the initiative would have appeared on the ballot with the consent of 25% of two consecutive legislatures.

for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools ... shall never be appropriated to any religious *sect* for the maintenance exclusively of its own schools." MASS. CONST. amend. art. XVIII (emphasis added).

The Know-Nothings were a secret society characterized by nativism and anti-Catholicism that seized political control of the state in 1854. They used their political power to impose their agenda to "Americanize America" and preserve Protestant hegemony in "a state-sponsored attack on the civil and political rights of the foreign-born and Roman Catholics that went beyond anything else found in the country." JOHN MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT 67, 102 (1990). The Know-Nothings' official acts in pursuit of these ends included dismissing Irish state employees, "inspecting nunneries," vigorously enforcing the Pauper Removal Act to ship mostly Catholic immigrants back to their homelands, and passing proposed constitutional amendments that would have barred Roman Catholics from public office. *Id.* at 102-3.

With regard to schools, the Know-Nothings mandated the reading of the Protestant Bible in public schools, barred foreign language instruction, and passed the Anti-Aid Amendment, which was sent to and approved by the voters. *Id.* These measures were intended to preserve the "Americanizing" influence of public schools and at the same time suppress the cultural threat thought to be posed by Catholic schools. *Id.* Notably, the Amendment did not prohibit public funding of "nonsectarian" (*i.e.*, Protestant) religious schools, which included public schools. *Id.*

ii. The 1917-18 Changes to the Anti-Aid Amendment Perpetuated Nativist Discrimination.

Beginning in 1900, nativists in the legislature each year proposed an "Anti-Sectarian Amendment" that would have

expanded the Anti-Aid Amendment to prohibit funding of *any* institution under "sectarian" (*i.e.*, Catholic) control. *See* I DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918 ("DEBATES") at 182 (1918). The 1917-18 amendments to the Anti-Aid Amendment that enact these prohibitions grew out of these Anti-Sectarian Amendments, which were introduced during a period of resurgence of organized Anti-Catholicism, and were sponsored by secret, religiously bigoted patriotic societies. *See* ROBERT H. LORD ET AL., III HISTORY OF THE ARCHDIOCESE OF BOSTON 583 (1944); CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL 254 (1988). "[T]he underlying agenda [of the Constitutional Convention] continued to be the creation of uniformity of belief[,]" part of a pattern "of fear of and hostility, in elite circles, toward Catholic immigrants." *See* GLENN at 254. The supporters of the Anti-Aid Amendment believed "that the children of immigrants would become 'real Americans' only by being subjected to schooling that took no notice of their religious background and the convictions of their parents." *Id.*

Indeed, the Convention's consideration of the anti-sectarian amendment was a reaction to growing Catholic power. As one delegate stated after election of a Catholic governor, "there were certain forces in the State that felt his election was a great menace, and so that helped to the securing of a following for this anti-sectarian amendment." I DEBATES at 183. At the Constitutional Convention itself, "the real cause of the collision over the anti-aid amendment was the antagonism of Catholic and Protestant." RAYMOND L. BRIDGMAN, THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917 at iv (1923). The *New York Times*[6] wrote upon the opening of the convention that "[t]he so called 'sectarian' or 'non-sectarian' amendment, directed in reality against the Catholic Church, is a fine bit of political

---

[6] *Bay State Constitution Patchers*, N.Y. TIMES, June 7, 1917 at 10.

bigotry. Somehow, the [American Protective Association] spirit ... lingers in Massachusetts, otherwise so mightily different from her seventeenth century self."[7] The delegates who supported the new Anti-Aid Amendment saw themselves as completing the work left unfinished by their predecessors in the 1850's. *See* I DEBATES at 159-60 (the 1853 Convention "lacked both in courage and in vision[.] ... They did not see how important it was to clear up this whole question, and they dealt only with public schools, leaving higher educational and charitable institutions entirely out of the question.")

In light of this history, an expert historian concluded (without contradiction by Respondents) that "[t]he action of the Massachusetts Constitutional Convention in 1917-18 in adopting the 'Anti-Aid Amendment' was clearly motivated by a prejudicial understanding of the place of ethnic and religious minorities in order to impose a state-endorsed orthodoxy of beliefs and loyalties." App. 87a.

iii. The Anti-Aid Amendment Is Selectively Enforced Today in Accordance With Its Original Discriminatory Intent.

Massachusetts strictly enforces the Anti-Aid Amendment's prohibition of state funds going to private schools.[8] But it regularly flouts those terms with respect to

---

[7] The APA was a virulently anti-Catholic organization politically active during the 1890's. *See* I DEBATES at 185; JOHN HIGHAM, STRANGERS IN THE LAND: PATTERN OF AMERICAN NATIVISM, 1860-1925, at 62-63, 80-87 (1998).

[8] *See Opinion of the Justices*, 401 Mass. 1201 (Mass. 1987) (proposed bill to allow parents of children attending private schools to receive a tax deduction for educational expenses is not permitted under Anti-Aid Amendment); *Haddad* v. *School Comm.*, 376 Mass. 51 (Mass. 1978) (prohibiting, under Anti-Aid Amendment, loan of textbooks to private schools); *Opinion of the Justices*, 357 Mass. 836 (Mass. 1970) (proposed bill reimbursing private schools for cost of providing secular educational services not permitted under the Anti-Aid Amendment).

the plain language added in 1917-18 prohibiting other private institutions from receiving public funds.

The record reveals numerous examples of such funding. For example, an examination of the fiscal year 2000 and 2001 budgets for the Commonwealth revealed at least 50 instances of appropriations of public funds for charitable and other private institutions (but not private primary and secondary schools) that are barred from receiving such funds by the Anti-Aid Amendment by its own terms. App. 75a-78a.[9] Examination of the budgets for fiscal years 1998, 1999, and 2002 reveals a similar pattern. *See id.* Similarly, an examination of the list of grantees of the Massachusetts Historical Commission for the years 1995-2000 and the Massachusetts Cultural Council for fiscal year 2001 reveals hundreds of examples of public funds being provided to private charitable and other institutions that are barred from receiving public funds by the Anti-Aid Amendment. *See id.*

So pervasive is the Commonwealth's policy of selectively enforcing the Anti-Aid Amendment's terms when it comes to funding private institutions (other than private schools), that in response to a request by the Petitioners, the Commonwealth was not able to identify a single example in the last five years of a private entity (other than a school) *ever* being denied funds by an agency of the Commonwealth in order to comply with the Anti-Aid Amendment. App. 72a.

Although seemingly *ultra vires*, the Commonwealth's policy of selectively enforcing the Anti-Aid Amendment by funding private institutions (other than private schools) is done with the explicit approval of the Massachusetts Supreme Court. In *Helmes* v. *Commonwealth*, 406 Mass.

---

[9] Among others, the Commonwealth funded the New England Shelter for Homeless Veterans, the YWCA, Billerica Boys and Girls Club, Boston Rescue Mission, Cambridge Salvation Army, American Red Cross and the Somerville Homeless Coalition. App. 75a-78a.

873 (1990), the Court permitted public funding of a private charitable institution in violation of the explicit language of the Anti-Aid Amendment. Though recognizing that the 1917-18 version of the Anti-Aid Amendment on its face bars appropriations to all private charitable groups, the Court held that "[t]he anti-aid amendment was focused on the practice of granting public aid to private schools," *id.* at 877, and that therefore the criteria for determining the permissibility of an appropriation "must be redefined" consistent with its original focus. *Id.* at 878. In holding that the Anti-Aid Amendment must be *redefined* consistent with its historical focus of prohibiting public aid of private schools, the Court could only have been referring to the original Know-Nothing amendment (which did exclusively focus on the funding of private schools), for the 1917 debates involved revisions that *extended* the Anti-Aid amendment to *other* types of private charitable institutions. Thus, the indisputable bigotry of the Know-Nothings taints the Commonwealth's present-day application of the Anti-Aid Amendment.

b. History of the Exclusions

Article 48 of the Massachusetts constitution establishes the initiative process as a means for citizens to initiate legislation and secure political change. MASS. CONST., amend. art. XLVIII § 1. The Religious Exclusion was introduced in the 1917-18 Constitutional Convention as an amendment to Article 48 designed to close off to the religious the otherwise generally available benefit of the initiative process as a means to secure beneficial legislation. *See* II DEBATES at 766-70. In the words of its sponsor, it was necessary to "protect the initiative and referendum against the religious fanatics and against the professional religionists." *Id.* at 767. The Exclusion's language effects this hostility to religion by closing the

initiative process to any political expression "that relates to religion, religious practices or religious institutions."

The Anti-Aid Exclusion was likewise introduced in the Constitutional Convention as an amendment to Article 48. *See* II DEBATES at 981-87, 97. Its adoption followed quickly on the heels of the revised Anti-Aid Amendment. On November 10, 1917, four days after the voters approved the Anti-Aid Amendment, the official newspaper of the Archdiocese of Boston published an editorial entitled "Nothing is Settled."[10] The editorial decried the Anti-Aid Amendment as based on anti-Catholic bigotry, and called on Catholics to work to amend the Constitution to remove it. On November 14th—four days after the editorial was published—Mr. Curtis, the chairman of the committee that reported the Anti-Aid Amendment, introduced language insulating the Anti-Aid Amendment from change through the initiative, and it was adopted. II DEBATES, at 996. Thus, the Anti-Aid Exclusion entrenched the entire Anti-Aid Amendment, the intent and effect of which—both then and now—is to target private, religious schools with government disapproval.

3. District Court Proceedings. Petitioners' amended complaint in this action challenges the Religious and Anti-Aid Exclusions, both on their face and as applied to exclude Petitioners' political expression from the initiative process, as a violation of their rights under the Free Speech, Free Exercise, and Equal Protection Clauses. On cross-motions for summary judgment, the district court entered judgment in Respondents'[11] favor. The court held that the challenged provisions imposed no restriction at all on speech, and therefore rejected Petitioners' free speech

---

[10] *Nothing is Settled*, THE PILOT, Nov. 10, 1917.

[11] Respondents are the Secretary of the Commonwealth and other Massachusetts officials who enforce the Exclusions.

claims. App. 28a. It also cursorily rejected Petitioners' Free Exercise and Equal Protection Claims, App. 36a.

4. First Circuit Decision. The First Circuit affirmed the grant of summary judgment on the Free Speech claim, but on slightly different grounds. It held first that the Exclusions did censor political expression. Nonetheless, it then upheld the Exclusions under intermediate scrutiny, refusing to apply the strict scrutiny standard review that the Eleventh Circuit, Sixth Circuit, and Supreme Judicial Court of Maine apply to content-based censorship of political expression in the initiative process. App. 5a.

The First Circuit held that the Religious Exclusion was neutral on its face and therefore rejected Petitioners' Free Exercise claim. App. 16a. It also refused to credit Petitioners' evidence of religious animus, and so concluded that there was no animus toward religion in its passage. App. 17a.

Finally, the court held that the Exclusions did not violate the Equal Protection Clause. Echoing its analysis of the Free Exercise claim, the court held that the Exclusions were facially neutral. App. 20a. It then distinguished *Hunter* v. *Erickson*, 393 U.S. 385 (1969) ("*Hunter*") and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), two cases that found facially neutral laws to impermissibly distort the political process along racial lines by making it more difficult for members of a minority to achieve beneficial legislation. Although both Exclusions distort the political process across religious lines by hindering members of a religious minority like Petitioners from securing beneficial legislation, the court asserted that the Exclusions were distinguishable from the laws struck down in *Hunter* and *Washington*. In the court's view, it was "obvious" that the provisions in those cases would *only* prevent legislation favorable to minorities, whereas the Exclusions would prevent initiatives favoring and disfavoring religion. App. 21a. As in its Free Exercise

analysis, the First Circuit refused to credit Petitioners' evidence of anti-religious animus in the passage of the challenged provisions, and therefore did not consider Petitioners' showing of disparate impact. App. 23a.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S RULING EXACERBATES THE SPLIT AMONG COURTS OF APPEALS OVER THE LEVEL OF SCRUTINY APPLIED TO CONTENT-BASED CENSORSHIP OF POLITICAL EXPRESSION IN STATE INITIATIVE PROCESSES

The "principal purpose" for the exercise of this Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." See *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). In its opinion, the First Circuit explicitly acknowledged its disagreement with the D.C. Circuit's treatment of content-based censorship of political expression in initiative processes. App. 10a. Its ruling is also at odds with the Sixth Circuit, the Eleventh Circuit, and the State of Maine which subject content-based regulations on political expression in the initiative process to strict scrutiny. Initiative speech "is at the core of our electoral process and of the First Amendment freedoms" because it is "an area of public policy where protection of robust discussion is at its zenith." *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988) (citations and quotation marks omitted). However, the First Circuit's decision in this case creates a three-way split over whether content-based restrictions on initiative petitions implicate core political speech. This Court should grant certiorari to provide a uniform standard under the Free Speech Clause for analyzing censorship of political expression in the initiative process.

A. The Exclusions Censor Political Expression in the Initiative Process in Two Ways, Both of Which Warrant Strict Scrutiny Review Under this Court's Precedents.

First, as discussed below, the Exclusions are a quintessential example of a content-based restriction on speech because they expressly condition access to the initiative process on the *content* of the political expression chosen by initiative proponents. Second, like the severe limits on political expression regulations found to require strict scrutiny in *Meyer*, 486 U.S. 414, and *Buckley* v. *ACLF*, 525 U.S. 182 (1999), the Exclusions directly prohibit initiative proponents from making the ideas for political change expressed in their initiative "the focus of statewide discussion" on the ballot. *Meyer*, 486 U.S. at 423.

1. The Exclusions Censor Political Expression in the Initiative Process Based on Content.

Content-based restrictions on speech triggering strict scrutiny are those that either prohibit speech on an entire subject or topic, or prohibit particular viewpoints on an otherwise includible subject. *See, e.g.*, *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); *see also Buckley*, 525 U.S. at 210 (Thomas, J, concurring) (initiative process restrictions that "burden[] speech ... by its content" require strict scrutiny review); *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992) (upholding ban on write-in candidates because it was not "content-based").

Both Exclusions restrict the political expression that may appear in an initiative petition based on content. In enforcing the Exclusions, the government examines the content of the political expression that appears in an

initiative petition. With regard to the Religious Exclusion, if that examination reveals political expression that relates to "religion" (as defined by the government), that speech is forbidden precisely because of that religious content. Similarly, with regard to the Anti-Aid Exclusion, if the government's review uncovers political expression relating to the Anti-Aid Amendment, then that speech is barred from the initiative process because of that content.

2. The Exclusions Directly Restrict Petitioners' Ability to Make Their Ideas for Political Change the Focus of Statewide Discussion on the Ballot.

Under *Meyer* and *Buckley*, restrictions on the ability to make ideas for political change a matter of statewide discussion the ballot are subject to strict scrutiny. Those cases concerned limitations on the initiative-petition circulation process that violated the First Amendment. The Petitioners, like the initiative proponents in those cases, "seek by petition to achieve political change." *Meyer*, 486 U.S. at 421. Just as the restrictions on who could be petition circulators in *Meyer* and *Buckley* made it "less likely" that the initiative proponents could "place the [initiative petition] on the ballot, thus limiting their ability to make the matter the focus of statewide discussion," *Meyer*, 486 U.S. at 423, so too do the Exclusions prevent political expression about religion and the nativist Anti-Aid Amendment from being included in an initiative petition on the ballot and becoming the focus of statewide discussion.

Indeed, the burden on political expression at issue here is even greater than the burdens in *Meyer* and *Buckley*. There, the restrictions simply made it "less likely" for an initiative expressing a particular desire for political change to appear on the ballot and become the focus of statewide discussion. In *Meyer*, the Court struck down a Colorado prohibition against paying circulators, while in *Buckley* the Court struck down other Colorado statutes requiring that

petition circulators be registered voters and wear identification badges with their names. In those cases it was still possible, with enough (volunteer) effort, to overcome the statutory burdens and achieve access to the ballot through the initiative process. Nevertheless, this Court found the burdens to be "severe," even though they created a headwind rather than a total ban. Here, the Exclusions *completely* preclude an initiative (like the Petitioners') from *ever* appearing on the ballot through the initiative process. If the initiative either relates to religion or the Anti-Aid Amendment, it is excluded. This is unmistakably more "severe" than the burdens in *Meyer* and *Buckley* that triggered strict scrutiny.

B. The First Circuit's Decision Creates a Three-Way Conflict Among Courts of Appeals Over the Proper Level of Scrutiny for Censorship of Political Expression in the Initiative Process.

Courts of appeals lack any semblance of a uniform standard for evaluating restrictions on political expression in the initiative process that, like the Exclusions, censor speech based on content and restrict the ability to make ideas for political change the focus of statewide discussion on the ballot. In particular, the First Circuit's decision opens up a three-way split among courts of appeals on whether to apply strict scrutiny, intermediate scrutiny, or no scrutiny at all to such limits on political expression.

1. The Eleventh Circuit, Sixth Circuit and Supreme Judicial Court of Maine Apply Strict Scrutiny.

In *Biddulph* v. *Mortham*, 89 F.3d 1491 (11th Cir. 1996), the Eleventh Circuit held that this Court's precedents require applying strict scrutiny to regulations of speech in the initiative process that "were content based or had a disparate impact on certain political viewpoints ... [or that] appl[ied] facially neutral regulations in a discriminatory

manner." *Biddulph*, 89 F.3d at 1500. *See also Delgado* v. *Smith*, 861 F.2d 1489, 1494 (11th Cir. 1988) ("[A]ny degree of governmental hindrance upon the freedom of a given group of citizens to pursue the initiative petition process with whomever, and concerning whatever they choose must be viewed with some suspicion."). The Sixth Circuit has also made clear that any limitations on political expression in the initiative process must be "nondiscriminatory" and "content-neutral." *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291, 297 (6th Cir. 1993).

Similarly, the Supreme Judicial Court of Maine has held that, in light of *Meyer*, "[r]estrictions on the right to undertake an initiative are subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest." *Wyman* v. *Sec'y of State*, 625 A.2d 307, 311 (Maine 1993) (citing *Meyer*, 486 U.S. at 420, 425). In *Wyman*, the plaintiff sought to amend Maine's constitution, but the Secretary of State "refus[ed] to furnish the petition form based on the *content* of the proposed legislation." *Id.* (emphasis added; citations omitted). The *Wyman* court emphasized that "[a]lthough the right to invoke an initiative is a state-created right, it does not follow that the state is free to impose limitations on that right without satisfying the dictates of the first amendment." *Id.* at 311 (citing *Meyer*, 486 U.S. at 425).

2. The D.C. Circuit Applies No Scrutiny.

By contrast, the D.C. Circuit has held that the government may prohibit speech from the initiative process based on content without requiring *any* level of scrutiny under the First Amendment. In *Marijuana Policy Project* v. *United States*, 304 F.3d 82 (D.C. Cir. 2002), the court upheld a law that directly censored political expression in the D.C. initiative process based on content. In particular,

the law prohibited any initiatives in favor of legalizing marijuana (including for medicinal use) from appearing on the ballot. The court reasoned that Congress' greater authority to forbid the District from enacting laws on all subjects included the lesser authority to forbid laws on a single subject. *Id.* at 85-86. Therefore, the D.C. Circuit concluded that such content-based limitations on political expression in the initiative process "restrict[] no First Amendment right." *Id.* at 87.[12]

3. The First Circuit Applies Intermediate Scrutiny.

The First Circuit chose to follow neither of these analyses, but instead adopted yet another test for content-based restrictions on political expression in the initiative process. Disagreeing with the approach of the D.C. Circuit, the First Circuit held that provisions like the Exclusions that censor certain types of political expression from appearing on the ballot in the initiative process do limit speech and therefore require at least some scrutiny under the Free Speech Clause. However, the First Circuit refused to adopt the majority rule that strict scrutiny should apply to such limitations on political expression. Instead, the court announced a new rule and evaluated the Exclusions' censorship of political expression in the initiative process under the intermediate scrutiny balancing test of *United States* v. *O'Brien*, 391 U.S. 367 (1968).

C. This Court Should Resolve the Confusion Exacerbated By the First Circuit's Decision.

---

[12] This Court's precedent, however, squarely precludes such a "greater includes the lesser" argument. To the contrary, this Court has held that once a State creates an initiative process, regulation of that process is subject to the constitutional constraints of the First Amendment, including exacting scrutiny for regulations that impose severe burdens on political expression. *See Meyer*, 486 U.S. at 425 (rejecting argument that "the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.").

Limitations on the initiative process implicate crucial political speech that is at the heart of First Amendment free speech protections. This case in its current posture is an appropriate vehicle to resolve the three-way conflict of whether strict, intermediate, or no scrutiny applies to initiative provisions that censor speech based on content and restrict the ability to make ideas for political change the focus of statewide discussion on the ballot. Moreover, absent this Court's review, federal and state courts in Maine will be forced to apply different standards of review to an identical Free Speech claim. A Free Speech claim challenging a content-based restriction on an initiative in a state court in Maine will receive strict scrutiny under *Wyman*, while the identical claim if brought in the Maine federal district court, would receive only intermediate scrutiny under the First Circuit's *Wirzburger* decision.

II. CERTIORARI IS WARRANTED TO CLARIFY THIS COURT'S PRECEDENTS CONCERNING WHEN FACIAL NEUTRALITY IS INSUFFICIENT TO SATISFY THE RESTRAINTS IMPOSED BY THE FREE EXERCISE CLAUSE AND EQUAL PROTECTION CLAUSE.

The First Circuit's rejection of Petitioners' Free Exercise and Equal Protection claims rested primarily on its judgment that the challenged Exclusions were facially neutral. App. 16a, 20a. As discussed below, this analysis failed to take account of this Court's precedents emphasizing that facial neutrality is not always sufficient to sustain laws under the Free Exercise and Equal Protection Clauses, particularly when such laws limit the ability of religious individuals to achieve beneficial legislation in the democratic process.

A. This Court's Free Exercise and Equal Protection Precedents Make Clear that Facial Neutrality Is Not

Sufficient To Assess Whether a Law's Treatment of a Religious Minority or Suspect Class Is In Fact Neutral.

This Court has acknowledged that Free Exercise and Equal Protection analyses share important features, especially when determining whether a law is neutral toward religion. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540 (1993) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."). In particular, neither the Free Exercise Clause nor the Equal Protection Clause allows drafters to save a discriminatory law from scrutiny by using calculated wording to give the appearance of neutrality.

In *Lukumi*, this Court found unconstitutional a city ordinance that forbade the killing of animals except by certain businesses who slaughtered animals for food. Although the ordinance was neutral on its face, this Court noted that "[f]acial neutrality is not determinative," *Lukumi*, 508 U.S. at 534, and looked to the actual effect of the law, its lack of narrow tailoring, and the intent of its drafers as factors in evaluating whether a superficially neutral ordinance made "subtle departures from neutrality" in violation of the Free Exercise Clause. *Id.*

This Court has also held that facial neutrality is insufficient in the Equal Protection context. This principle finds its clearest expression in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982). In *Hunter*, the Court found an equal protection violation in a city charter amendment that distorted the political process by requiring "*any* ordinance" seeking to regulate real property transactions on the basis of race, religion, or ancestry—whether for or against—to clear a special hurdle that was not imposed on laws regulating real property transactions on any other bases.

See Hunter, 458 U.S. at 386-87 (emphasis added). In contrast, the city council was free to pass laws regulating real property transactions on any other basis without clearing any additional hurdle. *Id.* at 390. The Court rejected the notion that such ostensibly evenhanded treatment under a facially neutral law was cause to deny an equal protection claim. The Court emphasized that "although the law on its face treats Negro, and white, Jew and gentile in an identical manner," this fact was irrelevant. *Id.* at 391. Instead, the Court held that the "reality" of making laws dealing with a suspect class such as race or religion clear a special hurdle is "that the law's impact falls on the minority[; t]he majority needs no protection." *Id.* The Court concluded that structuring the political process so as to place a special burden in the way of enacting laws dealing with race or religion was the equivalent of diluting voting rights: "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.* at 393.

Similarly, in *Washington*, this Court struck down a facially neutral law prohibiting school boards from requiring a student to attend a school that was not the closest to his home. Although the statute did not explicitly mention race, the Court found that "there is little doubt," *id.* at 471, that the statute was designed to prevent desegregative busing. It pointed not only to the history of its enactment but also to its design, which included exceptions for practically every purpose of busing besides racial desegregation. Despite the fact that "Negroes and whites may be counted among both the supporters and the opponents of" the anti-busing law and "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," *Washington*, 458 U.S. at 472 (internal quotation removed), the Court held that desegregation "inures primarily to the benefit of the

minority," *id.*, and thus that the statute was not neutral with regard to race. Requiring proponents of desegregative busing to seek legislative change at the more difficult statewide level, *id.* at 483, in contrast with those seeking other educational goals who could obtain relief before local school boards, was therefore an Equal Protection violation.

B. Certiorari Review Will Enable this Court to Correct the First Circuit's Truncated Analysis of Whether the Religious Exclusion Is Neutral.

The Religious Exclusion fails the constitutional requirement of neutrality toward religion by distorting the political process on the basis of a suspect classification.[13] In particular, the Religious Exclusion erects a hurdle that subjects Petitioners and fellow religious citizens seeking to enact laws addressing their religious interests to "a debilitating and often insurmountable disadvantage," that is not similarly visited on those seeking to pass laws addressing other issues. *Washington*, 458 U.S. at 484. The hurdle is clear: because the Religious Exclusion bars those seeking to enact laws dealing with religion from utilizing the initiative process to pass such laws, the Religious Exclusion forces them to use other, more difficult legislative means to try to enact those laws. That hurdle is indistinguishable from the discriminatory barrier found to lack neutrality in *Hunter* and *Washington*.

In this case, there is no doubt that the initiative process affords Petitioners and all other Massachusetts citizens a valuable benefit: citizens interested in passing a law that promotes their interests or ideas may bypass the normal legislative process and put the law directly to the people for approval. The Religious Exclusion, however, excludes

---

[13] *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (religion a "suspect distinction"); *Lukumi*, 508 U.S. at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion *or of religion in general*.") (emphasis added).

citizens from access to that benefit on the basis of religion. While those who wish to pass laws addressing secular interests, secular practices, or secular institutions may take full advantage of the benefit afforded by the initiative process, the same benefit is not afforded those who wish to pass laws dealing with "religion, religious practices, or religious institutions."[14]

The Religious Exclusion's lack of neutrality is not saved by the disingenuous assertion that it ostensibly "prevents both initiatives that would disfavor as well as those that might benefit religion." App. 21a. This assertion calls to mind Anatole France's comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread. As this Court noted in *Washington*, certain subjects of laws obviously disproportionately affect certain classes of citizens. In *Washington*, the Court noted that, while support for desegregation may not track 100% with race, desegregation obviously held the greatest benefit for African-Americans. Similarly while in theory both religious and non-religious individuals might wish to pass an initiative touching on religion, religious individuals plainly have the greater stake in the matter.

For example, the Religious Exclusion precludes religious individuals from proposing initiatives granting a religious exception for sacramental use of peyote, requiring employer accommodation of employee religious dress, or

---

[14] A concrete example illustrates how the Religious Exclusion cripples religious individuals' ability to participate fully in political affairs of the community. Massachusetts prohibits marijuana use. Those who wish to change this law for secular reasons—e.g., medicinal use—may do so. However, the Religious Exclusion prohibits those (*e.g.*, Rastafarians) seeking a religious exception because the Exclusion denies religious citizens the ability to pursue interests related to their religion.

permitting municipalities to waive parking requirements for Orthodox Jewish synagogues. The Religious Exclusion thus leaves religious individuals, especially members of minority religions with little representation in the legislature, with virtually no access to the political process for matters essential to their free exercise rights. This is particularly pernicious in light of this Court's instruction that citizens seeking accommodation for their religious beliefs in the form of exemptions from generally applicable laws should primarily seek such "accommodation ... [in] the political process" rather than in the courts. *Employment Div.* v. *Smith*, 494 U.S. 872, 890 (1990). Indeed, while the initiative process *is* available for citizens to pass neutral, generally applicable laws that *disfavor* the religious by incidentally burdening religious exercise (but which don't run afoul of the Religious Exclusion because they don't mention religion in their text), the initiative process is closed off to the religious who seek special accommodations in the political process to lift the burdens of neutral, generally applicable laws.

The history of the Religious Exclusion's adoption further reinforces the conclusion that despite any patina of facial neutrality, the Exclusion is not in fact neutral. *See, e.g., Lukumi*, 508 U.S. at 540. (inquiry into whether a law lacks neutrality may extend beyond the law's text to the circumstances of its enactment, including legislative history). In particular, Mr. Swig, the Religious Exclusion's sponsor, made his intent to single out religion for special disfavor clear:

> [W]hy do I propose this amendment? I propose it because I feel that we are a Constitutional Convention met to adopt regulations governing the body politic, and not the body religious, and from the very first day that I crossed over the threshold of this floor I have been unable to understand why religion had anything to do with a body politic and

> that is why you found me among those who argued for the passage of the anti-aid amendment. ... I am endeavoring by means of my amendment, to protect the initiative ... from the efforts that will be made by religious fanatics and these professional religionists, to drag constantly before the people these religious fights.

II DEBATES at 767 (emphasis added). *See also id.* at 769 ("feeling, as I do, that religion has no place in politics at all, I think that we ought to make it as difficult as possible to bring religious questions into the politics of this State").[15]

Finally, the Religious Exclusion's lack of neutrality is also clear from its overbreadth and underbreadth with respect to the interests Massachusetts claims the Exclusion protects. The First Circuit identifies Massachusetts' interests protected by the Exclusion as ensuring that "sensitive measures" relating to religion are "not [] made or initiated by the public initiative but rather only via the legislatures," App. 22a, and "preventing the establishment of religion." App. 24a. The Exclusion is not well-tailored to either interest, suggesting that its goal was to target religion, not to advance its stated interests. *See Lukumi*, 508 U.S. at 543-45.

Even if keeping "sensitive measures" out of the initiative is a valid governmental interest, it is not well-served in the Religious Exclusion. On that basis, the Religious Exclusion is underinclusive, because initiatives

---

[15] The First Circuit's statement that "[n]o evidence has been offered that the [Religious E]xclusion was motivated by the same Anti-Catholic animus that impelled the passage of the original Anti-Aid Amendment" is demonstrably false. In fact, Plaintiffs offered the *uncontroverted* opinion of an expert historian that the motivation for the Religious Exclusion was anti-Catholic animus. *See* Declaration of Charles L. Glenn, App. 87a. By ignoring this uncontroverted expert opinion, the First Circuit misapplied the summary judgment standard. *See* Plaintiffs-Appellants' Petition for Panel Rehearing, App. 64a-68a.

have, at the Attorney General's discretion, been certified for many equally or more controversial issues, including affirmative action, *see* Doris Sue Wong, *AG Rejects Death Penalty Ballot Item; Affirmative Action May Face '96 Vote*, BOSTON GLOBE, Sep. 7, 1995, at 1, tax repeals, *see id.*, same-sex marriage, *see Initiatives Headed Towards Nov. Ballot*, BOSTON GLOBE, Dec. 21, 2001, at B2; softening sentences for drug-related crimes, *see* Lane Lambert, *Question 8 – drug treatment*, PATRIOT LEDGER, Nov. 1, 2000, at 1. The Religious Exclusion is also overbroad, because many issues that are not sensitive or controversial but that nonetheless touch on religion would be excluded. For example, an initiative setting forth fire codes for churches is unlikely to produce political dispute, but would not be allowed under the Religious Exclusion.

The Religious Exclusion also is not well-tailored to prevent the asserted interest of avoiding establishment of religion. There is no basis to assert that any significant proportion of initiatives relating to religion, religious practices, or religious institutions would in fact violate the Establishment Clause. A more narrowly tailored means of accomplishing these goals would be to exclude only those measures and laws that actually violate the Establishment Clause (or the Massachusetts equivalent thereof). Such limitations on the initiative process to exclude unconstitutional initiatives are common and constitutional. *See, e.g.*, ARK. CODE. ANN. § 14-14-914(b) ("No county legislative measure shall be enacted contrary to the Arkansas Constitution or any general state law which operates uniformly throughout the state"); MICH. CONST. art. II, § 9 ("The power of initiative extends only to laws which the legislature may enact under this constitution."); MISS. CONST. art. 15 § 273(5) ("The initiative process shall not be used: (a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution"). The lack of correspondence between the state's asserted

interests in this case and the Religious Exclusion suggests, as the Court found in both *Lukumi* and *Hunter*, that the actual intent underlying the provision was discriminatory.

In sum, it is not enough to conclude (as the First Circuit did) that the Religious Exclusion is neutral because its facial language appears to impose identical restrictions on religious and non-religious citizens. Instead, an examination of the Exclusion's actual effects, the intent of those who enacted it, and its lack of narrow tailoring, all point to the Exclusion's lack of neutrality under the Free Exercise and Equal Protection Clauses. The Religious Exclusion, like the laws at issue in *Hunter* and *Washington*, distorts the political process by imposing roadblocks that make it more difficult for religious individuals to achieve beneficial legislation that corresponds to their particular religious interests.

C. Certiorari Review Will Enable this Court to Correct the First Circuit's Truncated Analysis of Whether the Anti-Aid Exclusion Is Neutral.

The Anti-Aid Exclusion also violates the constitutional requirement of neutrality by erecting a discriminatory barrier in the political process that was originally passed to target—and to this day still primarily harms—religious individuals. Because the intent and effect of the Anti-Aid Amendment is to specially burden the religious, the Anti-Aid Exclusion's insulation of the Amendment from repeal distorts the political process across religious lines by hindering members of a religious minority like Petitioners in their pursuit of beneficial legislation. *See Washington*, 458 U.S. at 467 (Equal Protection prohibits political structure that "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."). *Romer* v. *Evans*, 517 U.S. 620 (1996), represents the most recent expression of this principle, where the Supreme Court struck down a

state law prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination as an equal protection violation. Under *Romer*, merely insulating a legislative *status quo* against change is a violation of Equal Protection when that insulation clearly privileges one group over another. *See id.*, 517 U.S. at 633-34. If the non-suspect class considered in *Romer* enjoys such protection, the suspect class of religious persons at issue here must be protected also.[16]

The Anti-Aid Exclusion erects a barrier that discriminatorily affects religious individuals. It applies uniquely to those seeking to amend the Anti-Aid Amendment so that Massachusetts' private schools, most of which are religious and overwhelmingly filled with students seeking a religious education, can receive public funds. As discussed extensively *supra*, the Anti-Aid Amendment is discriminatorily applied to prevent public funding of private schools, but is not applied with equal vigor to prevent funding of other private charitable institutions.[17] This pattern of application confirms and perpetuates the discrimination that prompted the original passage of the Anti-Aid Amendment, which even the First Circuit acknowledged. *See* App. 23a ("plaintiffs present evidence that widespread anti-Catholic prejudice was a motivating factor behind passage of the original Anti-Aid Amendment in 1855"). Because the intent and effect of the Anti-Aid *Amendment* is to specially burden the religious, the Anti-Aid *Exclusion's* enforcement and entrenchment of

---

[16] In this case, Petitioners are *more* constrained than the plaintiffs in *Romer*, as they may not even "enlist[] the citizenry" of Massachusetts to amend the harmful portions of the constitution in the initiative process, as others are allowed to do. *See id.* at 631.

[17] Other federal courts have found religion-based discrimination in the application of a law even where the law was facially neutral. *See, e.g., Tenafly Eruv Ass'n.* v. *Tenafly*, 309 F.3d 144 (3d Cir. 2002).

the Anti-Aid *Amendment* distorts the political process according to the suspect category of religion.

The effect of the Anti-Aid Exclusion has a discriminatory impact on religious individuals. While the First Circuit made much of a 1917 revision of the Anti-Aid Amendment that barred funding of "institutions," not only "schools," this expansion has always been a dead letter. The Commonwealth has not identified *a single example* of a non-public, non-school entity ever being denied funds by an agency of the Commonwealth in order to comply with the Anti-Aid Amendment. App. 72a. Instead, Massachusetts regularly flouts the plain language of the Anti-Aid Amendment by providing public funds to charitable and other private institutions that, it would seem, should be barred from receiving such funds by the Anti-Aid Amendment's explicit language. *See supra* at 8. Moreover, the Commonwealth does so with the explicit approval of the Massachusetts Supreme Court, openly applying the Amendment according to its original bigoted 1854-55 purpose of singling out religious *schools* for special disfavor.[18] Present-day, selective enforcement of the Anti-Aid Amendment—freely funding private religious and nonreligious institutions *except* in the school context—does nothing to mitigate the discriminatory intent or effect of the Amendment. Instead, it shows that current practice tracks the bigoted language of the original Amendment, confirming that the 1917 changes were merely repackaging.

As the selective non-enforcement of the Anti-Aid Amendment's provisions against funding charitable institutions *other than schools* has effectively repealed those provisions, non-school institutions are unaffected by the Anti-Aid Exclusion. It is only members of a religious

---

[18] *See Helmes*, 406 Mass. at 877-78 (permitting public funding of a private charitable institution in violation of the Anti-Aid Amendment's explicit language).

minority like the Plaintiffs who desire public funding of private schools, most of which are religious and overwhelmingly populated with students seeking a religious education, who bear the brunt of the Exclusion's barrier to changing the Anti-Aid Amendment through the initiative process.

As is clear in the history and application of the Anti-Aid Amendment, the intent and impact of the Amendment are discriminatory—imposing a special burden on religious adherents. To insulate that special burden from repeal by initiative as the Anti-Aid Exclusion does is to distort the political process along religious lines, violating the constitutional requirement of neutrality by hindering a religious minority like the Plaintiffs in their pursuit of beneficial legislation. *See Washington*, 458 U.S. at 467 (Equal Protection prohibits political structure that "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
ERIC C. RASSBACH
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036-1735
(202) 955-0095
Counsel for Petitioners

October 19, 2005

APPENDIX

United States Court of Appeals
For the First Circuit

No. 04-1625

MICHAEL WIRZBURGER, *ET AL.*,

Plaintiffs, Appellants,

v.

WILLIAM F. GALVIN, *ET AL.*,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRCIT OF MASSACHUSETTS
[Hon. George A. O'Toole, Jr., U.S. District Judge]

Before
Torruella, Circuit Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

Derek L. Gaubatz, with whom Anthony R. Picarello, Jr., Roman P. Storzer, Burns & Levinson LLP, Michael J. Meagher and Robert J. O'Regan were on brief, for appellants.

William F. Porter, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and Peter Sacks, Assistant Attorney General, were on brief, for appellees.

June 24, 2005

TORRUELLA, Circuit Judge. Plaintiffs-appellants would like to amend the Massachusetts Constitution to allow public financial support to be directed toward private, religiously affiliated schools. Plaintiffs attempted to propose their amendment through the Massachusetts initiative procedure, but two distinct provisions of the Massachusetts Constitution prevented initiatives on this subject. They now challenge these subject-matter exclusions from the initiative process on federal Free Speech, Free Exercise, and Equal Protection grounds. In the end, plaintiffs' arguments fail, and although our analysis diverges at points, we affirm the district court's grant of summary judgment.[1]

I. Facts

Plaintiffs are parents of children enrolled in religiously affiliated schools who sought to amend Amendment Article 18 of the Massachusetts Constitution (the "Anti-Aid Amendment"), which prohibits public financial support for private primary or secondary schools.[2] Mass. Const.

---

[1] In sum, because we recognize the communicative aspect of the initiative process, we apply intermediate scrutiny to Massachusetts' initiative exclusions, whereas the district court applied rational basis review. We find that the exclusions nevertheless survive this heightened review. Our Free Exercise and Equal Protection Clause analyses elaborate on the district court's similar grounds for decision.

[2] The district court found that Plaintiffs lacked standing to challenge the constitutionality of the Anti-Aid Amendment directly, but that issue has not been raised on appeal.

amend. art. 18. Article 48 of the Massachusetts Constitution provides that, in addition to the amendment procedure available to the state legislature, the Constitution may also be amended by popular initiative. Mass. Const. amend. art. 48, pt. 1. Following the required procedure, plaintiffs submitted an initiative petition, for certification, to the Massachusetts Attorney General to modify the Anti-Aid Amendment by adding a sentence stating that nothing in the Anti-Aid Amendment shall prevent the Commonwealth from providing loans, grants, or tax benefits to students attending private schools, regardless of the schools' religious affiliation. The Attorney General, however, denied certification of the proposed initiative, because Article 48 prohibits amendment of the Anti-Aid Amendment by initiative (the "Anti-Aid Exclusion") and because the petition explicitly relates to "religious institutions," another matter expressly excluded from the initiative process by Article 48 (the "Religious Exclusion").

Section Two of Article 48 limits Massachusetts' initiative process by listing the "Excluded Matters," which are not subject to popular action by initiative, including, inter alia, appointment or compensation of judges; the powers, creation or abolition of the courts; and specific appropriation of state money. Mass. Const. amend. art. 48, pt. 2, § 2. The pertinent provision of Article 48, referred to as the Anti-Aid Exclusion, states that "[n]either the eighteenth [Anti-Aid] amendment of the constitution ... nor this provision for its protection, shall be the subject of an initiative amendment," while the Religious Exclusion mandates that "[n]o measure that relates to religion, religious practices or religious institutions ... shall be proposed by an initiative petition." Id. Plaintiffs challenge the validity of both of these exclusions under the U.S. Constitution.

II. Analysis

A. Free Speech Claim

The first issue before us is whether the Massachusetts Constitution's limitations on the initiative process violate the First Amendment free speech rights of prospective initiative proponents. Appellants argue that the exclusions to the state initiative process, which prevent them from pursuing amendments regarding religion or state aid to private institutions, should be considered content-based restrictions on core political speech subject to strict scrutiny.

The difficulty with the appellants' argument is that a state initiative procedure, although it may involve speech, is also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved in the initiative process. In other words, the challenged exclusions constitute regulations "aimed at non-communicative impact, but nonetheless having adverse effects on communicative opportunity." Laurence H. Tribe, American Constitutional Law § 12-2 at 790 (2d ed.1988). See, e.g., United States v. O'Brien, 391 U.S. 367, 382, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (rejecting draft card burner's claim that a statute prohibiting the destruction of draft cards violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct," although the court recognized the symbolic value of burning a draft card). Unlike regulations that are "aimed at communicative impact," regulations that aim at preventing some harm independent of speech--in this case, the use of the initiative process for the passage of certain types of laws believed to be unsuited to that process--are not presumed unconstitutional, and are not subjected to strict scrutiny.

Tribe, American Constitutional Law § 12-2, at 790. See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 291, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (upholding a ban on nude dancing, because "the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare," which are unrelated to expression). Regulations of this type are, at most, subject to intermediate scrutiny, under which they will be upheld if the "harmful consequences of this particular form of expressive behavior, quite apart from any ideas it might convey, outweigh the good." Tribe, *American Constitutional Law* § 12-2, 791. *Id., e.g.*, Grayned v. Rockford, 408 U.S. 104, 115-16, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (upholding ordinance barring noisy demonstrations near schools, because the government has sufficiently "weighty reasons" to restrict this type of expressive activity). Applying this balancing, we uphold Massachusetts' exclusions to its initiative process for the reasons explained below.

Before arriving at this explanation, we will first examine the arguments of the parties--a task that is particularly difficult in this case, because the parties have planted themselves firmly at opposite poles, with plaintiffs arguing for strict scrutiny and Massachusetts arguing that only minimal rationality review is appropriate. In the end, we find that the law requires our analysis to proceed by a middle path in this apparent battle of absolutes. We hold that Massachusetts' exclusions to its initiative process are narrowly drawn to further a significant state interest, and thus survive intermediate scrutiny.

1. The Communicative Value of the Initiative Process

The first step in our free speech analysis must be to determine whether citizens' use of the initiative process constitutes expressive conduct, permitting appellants to invoke the First Amendment to challenge the Massachusetts initiative exclusions. See, e.g., Texas v. Johnson, 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (citing Spence v. Washington, 418 U.S. 405, 409-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). We do not find that there is any serious debate as to this point. A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative. The Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech. See Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (overturning state's prohibition on using paid petition circulators); Buckley v. Am. Constitutional Law Found., *Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (overturning various registration requirements for petition circulators). In Meyer, the Supreme Court recognized that "the solicitation of signatures for a petition involves protected speech." 486 U.S. at 422, n. 5, 108 S.Ct. 1886. Furthermore, the mere fact that plaintiffs "remain free to employ other means to disseminate their ideas does not take their [preferred means of] speech through [the initiative process] outside the bounds of First Amendment protection." Id. at 424, 108 S.Ct. 1886. Clearly, plaintiffs have been prevented from engaging in the sort of activity that implicates the First Amendment. This conclusion, however, in no way ends our analysis; it only opens the door for us to apply constitutional freedom of speech principles to the limitations Massachusetts places on its

initiative process.

We have recognized that "a fine line separates permissible regulation of state election processes from impermissible abridgement of First Amendment rights," Pérez-Guzmán v. Gracia, 346 F.3d 229, 239 (1st Cir.2003), and the same is true of regulation of state initiative procedures. In Pérez-Guzmán, 346 F.3d at 239-47, we invalidated Puerto Rico's requirement that petition signatures needed for registering a new political party to appear on the general election ballot be notarized, holding that it violated the First Amendment of the federal Constitution. In so doing, we stated that "we afford exacting scrutiny to severe restrictions on ballot access." Id. at 239. We began our analysis "with an assessment of the severity of the restriction," Id., and having found it to be severe, we applied strict scrutiny, Id. at 243-44.

Plaintiffs argue that we should apply a similar two-step analysis here. However, plaintiffs' suggested analysis makes an end-run around the most difficult part of their case. The district court in this case found that speech was only incidentally affected by the Massachusetts subject matter exclusions. Boyette v. Galvin, 311 F.Supp.2d 237, 240 (D.Mass.2004). Although the district court recognized that speech was involved, it concluded that the primary goal of the exclusion was to prevent certain types of laws from being passed by means of the popular initiative process, and not to limit *what* people could say or *how* they could say it. Id. at 240-41. By contrast, the common denominator in Pérez-Guzmán and other cases cited by plaintiffs is a direct restriction on the communicative aspect of the political process. In Pérez-Guzmán, like in Meyer, the state regulated how people could promulgate their political views, in their respective attempts to put a new party on the ballot, Pérez-Guzmán, 346 F.3d at 230-31, and

to circulate petitions for a proposed initiative, Meyer, 486 U.S. at 414, 108 S.Ct. 1886. Strict scrutiny applied in these cases precisely because they involved direct regulation of the petition process itself.

We believe that the present case calls for a lower level of scrutiny. We know of no general principle that, in addition to constitutional amendment or lawmaking via a process instituted by the state legislature, a state must provide an opportunity for its residents to propose constitutional amendments or laws on all subjects by means of an initiative process. While we accept that use of the initiative process can facilitate dissemination of initiative proponents' views, the next step in a free speech analysis is to determine whether or not the regulation in question aims at regulating speech, or whether it has some other primary end, such that any effect on speech is purely incidental. As we alluded to at the outset of this analysis, the First Amendment generally provides greater protection against laws that are "aimed at communicative impact" of the conduct they regulate than from laws "aimed at non-communicative impact, but nonetheless having adverse effects on communicative opportunity." Tribe, American Constitutional Law § 12-2, at 790. The primary goal of state initiative procedures is to create an avenue of direct democracy whereby citizens can participate in the generation of legislation--that is, the act of creating law. Laws such as those considered in Meyer and its progeny were aimed at directly regulating the means that initiative proponents could use to reach their audience of potential petition signers. In contrast, we find that subject matter exclusions like those regulating the Massachusetts initiative process aim at preventing the act of generating laws and constitutional amendments about certain subjects by initiative. While they eliminate a valuable avenue of expression about those subjects, the speech restriction is no

more than an unintended side-effect of the exclusions. It is because of this sometimes overlooked, but nevertheless fundamental principle in constitutional free speech doctrine that we must reject appellants' proposed analysis. We turn now to Massachusetts' proposed alternative analysis.

2. Massachusetts' Need to Regulate the Lawmaking Act

The communicative power of an initiative stems precisely from the fact that it is not just speech; it is a process that can lead to the creation of new laws or constitutional amendments. Massachusetts urges us to hold that its restrictions on the amendment process do not regulate speech qua speech, and thus do not trigger strict scrutiny under the First Amendment.

Government actions that are aimed at some goal other than restricting the conveyance of ideas are generally permissible, even if they incidentally inhibit free speech. Id., e.g., Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (upholding the closure of an adult bookstore because prostitution was taking place on the premises). Arcara is a prototypical example of this type of case, because the law in question only regulated a specific type of conduct--prostitution--which did not implicate speech. However, even a law seemingly entirely removed from speech can have effects on speech. In Arcara, for example, the prohibition on prostitution resulted in the closure of a book store. Enforcement of a prohibition with such incidental effects does not, however, implicate the First Amendment, and this type of law need only survive rationality review.

Plaintiffs do not cite to any precedent for the proposition that, under the Free Speech Clause of the First

Amendment, a state may not restrict the subjects that can be addressed through its initiative process. The D.C. Circuit addressed a similar free speech challenge to a restriction on an initiative process in the case of Marijuana Policy Project v. United States, 304 F.3d 82 (D.C.Cir.2002). In that case, the D.C. Circuit held that a statute precluding the use of the D.C. ballot initiative process to lower drug penalties did not unconstitutionally restrict free speech rights of medical marijuana advocates, but only shifted the forum of debate from the District of Columbia to Congress. Id. at 85-86. The court explained that "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." Id. at 85. Massachusetts argues that we should adopt this reasoning to apply rational basis review in the instant case.

3. Regulating Conduct with Speech and Nonspeech Elements

We cannot agree with the D.C. Circuit's finding that subject-matter exclusions from the initiative process "restrict[ ] no speech," Id. at 85, nor with its conclusion that this type of selective carve-out "implicates no First Amendment concerns," Id. at 83. For the same reasons, we also reject Massachusetts' argument that we should apply only rational basis review to the Anti-Aid and Religious Exclusions. This case is not like Arcara, where the Supreme Court criticized the New York Court of Appeals for having applied the analysis established in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), because the Court did not consider the regulated conduct-- prostitution--expressive. Id. Arcara, 478 U.S. at 705, 106 S.Ct. 3172 (concluding that "unlike the symbolic draft card burning in O'Brien, the sexual activity carried on in this case manifests absolutely no element of protected

expression"). Rather, we would continue along the analysis laid out by the Supreme Court in Texas v. Johnson, 491 U.S. at 403, 109 S.Ct. 2533. Having determined that Meyer, 486 U.S. at 422, 108 S.Ct. 1886, indicates that a state initiative process manifests elements of protected expression, under Johnson, "we next decide whether the State's regulation is related to the suppression of free expression." 491 U.S. at 403, 109 S.Ct. 2533. Here, as we have already explained, the Massachusetts exclusions in question regulate which types of laws or amendments can be passed by initiative, without any reference to who may speak or what message they may convey. Thus, because "the State's regulation is not related to expression, ... the less stringent standard [the Supreme Court] announced in United States v. O'Brien for regulations of noncommunicative conduct controls." Id. (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673 (finding that, although burning a draft card can be expressive conduct, the federal government's interest in preventing the destruction of draft cards is sufficient to uphold defendant's conviction)).

The standard enunciated in O'Brien governs "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." O'Brien, 391 U.S. at 376, 88 S.Ct. 1673. Id. also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (applying O'Brien scrutiny to the application of a ban on camping on the Mall in Washington, D.C., to demonstrators who sought to sleep overnight there to protest the plight of homeless people). While we agree with the D.C. Circuit that this type of regulation of a state initiative process is not aimed at regulating speech, we cannot see how, given the Supreme Court's analysis in Meyer, subject-matter exclusions from a state initiative process "restrict [ ] no speech." Marijuana Policy Project, 304 F.3d at 85. To the contrary, since expression is

affected by the regulations of the state initiative process, we apply the intermediate scrutiny standard set out in O'Brien.

4. Applying O'Brien Scrutiny

Under the O'Brien standard, conduct combining "speech" and "non-speech" elements can be regulated if four requirements are met: (1) the regulation "is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377, 88 S.Ct. 1673. We have no difficulty finding that the Massachusetts exclusions meet the second requirement, as Massachusetts certainly has a substantial interest in maintaining the proper balance between promoting free exercise and preventing state establishment of religion. Neither do we doubt that Massachusetts has a substantial interest in restricting the means by which these fundamental rights can be changed. We have already stated that the exclusions aim at preventing certain uses of the initiative process, not at stemming expression, and thus meet the third O'Brien requirement.

As for the first requirement, that the regulation be within the constitutional power of the government, we find that the only serious, non-speech-related constitutional challenges to Massachusetts' power to regulate the subjects that may be reached by its initiative process are the Free Exercise and Equal Protection arguments, which we reject in this opinion. Having now concluded that Massachusetts' interest in protecting the fundamental free exercise and freedom from state-established religion is substantial and its method otherwise constitutionally permissible, we

finally consider the fourth O'Brien requirement: whether the incidental restrictions on would-be initiative proponents' First Amendment freedoms are greater than essential to the furtherance of that interest. Since we see no other way in which Massachusetts could achieve its interest in safeguarding these fundamental freedoms in its Constitution from popular initiative, we recognize that the restriction on speech is no more than is essential. Thus, we conclude that Massachusetts' Anti-Aid and Religious Exclusions do not violate the First Amendment free speech guarantee.

B. Free Exercise Claim

We now consider whether the Religious Exclusion violates the Free Exercise Clause of the First Amendment.[3] The Free Exercise Clause guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I (emphasis added), and it has been applied to the States through the Fourteenth Amendment. Id. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The protections provided by the Free Exercise Clause may be broken down into a number of conceptual categories, none of which are implicated by the Religious Exclusion. First and foremost, the Free Exercise Clause entails an absolute prohibition on government infringement on the "freedom to believe." Torcaso v. Watkins, 367 U.S. 488, 492-93, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). Because the prohibition is absolute, laws which infringe on individuals' freedom of belief are per se unconstitutional.

---

[3] Appellants do not challenge the Anti-Aid Exclusion under the Free Exercise Clause.

Id. (refusing to consider the state's asserted justifications for a law that infringed on citizens' freedom of belief); Id. also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (holding that a state could not compel students in public schools to salute the flag, where their religion forbade it). However, that prohibition is inapposite here because the Religious Exclusion does not hinge on the religious beliefs of initiative proponents. Id. McDaniel v. Paty, 435 U.S. 618, 627, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (finding that a Tennessee law that precluded ministers from eligibility as constitutional convention delegates did not infringe on freedom of belief, but nevertheless invalidating it under strict scrutiny).

In McDaniel v. Paty, the Supreme Court examined a state law preventing a minister from serving as a constitutional convention delegate under strict scrutiny, because although it did not directly burden his religious beliefs, it directly burdened his religious "status, acts, and conduct." McDaniel, 435 U.S. at 626-27, 98 S.Ct. 1322. This protection is related to, though distinct from, the per se prohibition on laws infringing on belief. Arguing from McDaniel, plaintiffs maintain that a state violates the Free Exercise Clause when it creates a general political process, but excludes some from access to that process on the basis of religion. However, plaintiffs fail to explain how this proposition applies to their case. The Religious Exclusion prevents anyone from proposing new laws or constitutional amendments relating to religion through the initiative process. It does not exclude religious people, or people of a certain religion, from proposing laws or amendments. In other words, a religious individual of any particular faith, like any other citizen, can propose a new law or amendment on any subject that is open to amendment by initiative.

Moreover, the Religious Exclusion we are asked to scrutinize does not distinguish based on religious status.[4] Like the scholarship program at issue in Locke v. Davey, the Religious Exclusion does not deny plaintiffs "the right to participate in the political affairs of the community," 540 U.S. at 720, 124 S.Ct. 1307 (distinguishing Locke from McDaniel, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593); nor does it "require[ ] [plaintiffs] to choose between their religious beliefs and receiving a government benefit." Id. at 720-21, 98 S.Ct. 1322 (distinguishing Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)). The exclusion applies equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof.

Having concluded that the Religious Exclusion does not discriminate on the basis of religious belief or status, we also briefly note that plaintiffs make no colorable argument that the exclusion prohibits any religious act or conduct. It does not, for example, preclude performing rites required by their religion, Id. Church of the Lukumi Babalu Aye v.

---

[4] Plaintiffs claim that McDaniel stands for the proposition that opponents of a law need not show that the law imposes a particular burden on religious belief or practice. Although this may be true as a general proposition, this leaves plaintiffs to argue that they are being discriminated against on the basis of religious "status," as was the case in McDaniel. 435 U.S. at 626-27, 98 S.Ct. 1322 (finding violation of plaintiff's right to Free Exercise of religion where his status as a minister resulted in discrimination). However, plaintiffs make no headway with this argument because they cannot show that the Massachusetts Religious Exclusion treats people differently based on their religious "status."

City of Hialeah, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (outlawing animal sacrifice central to the Santería religion), or single out their religion's method of worship, Id. Fowler *v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953) (preventing Jehovah's Witnesses from meeting in public parks while other denominations were allowed to hold services). The Supreme Court has stated its reluctance to strike down "legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself." Braunfeld v. Brown, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Certainly, the amendments that plaintiffs want to propose may be motivated by their religious beliefs, but they do not claim that working to pass those amendments is an aspect of practicing their religion.

Finally, plaintiffs ask us to consider whether the passage of the Religious Exclusion was motivated by animus toward religion. The Supreme Court has considered the existence of animus motivating a law's proponents when determining whether the law violates the Free Exercise Clause of the First Amendment. Id., e.g., Locke, 540 U.S. at 725, 124 S.Ct. 1307 (finding nothing in the history, text or application of the Washington scholarship program in question "that suggests animus towards religion"). In the Establishment Clause context, the Supreme Court has "often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." Church of the Lukumi, 508 U.S. at 532, 113 S.Ct. 2217 (noting that "[t]hese cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here"). Although plaintiffs present significant evidence of animus

against Catholics in Massachusetts in 1855 when the Anti-Aid Amendment was passed, they fail to show that religious animus motivated the passage of the Religious Exclusion in 1918. Plaintiffs rely heavily on one statement made by the Religious Exclusion's sponsor, indicating that he would "protect the initiative and referendum against the religious fanatics and against the professional religionists." However, we need not reach the question of whether this type of fervor against religiously motivated political action would require that the amendment be struck down, because plaintiffs present no evidence that the other members of the Constitutional Convention of 1917-1918 acted from similar motivations. Given the wide margin by which the Religious Exclusion passed, and the significant Catholic representation at the Convention, we see no evidence that animus against religion was a motivating factor behind the Exclusion's passage.

Furthermore, plaintiffs cite to no case in which evidence of animus toward religion was itself sufficient to invalidate a government action, without the animus being tied to some resulting infringement on freedom of belief or on religious status, acts or conduct. While we must apply strict scrutiny when "the object of a law is to infringe upon or restrict practices because of their religious motivation," plaintiffs here have not shown that the Religious Exclusion results in any restriction of their religious practices. Id. at 533, 113 S.Ct. 2217 (citing Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878-79, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)) (emphasis added) (considering evidence of animus toward the Santería religion where the ordinance prohibiting ritual slaughter of animals did not, on its face, target the Santería religion, but effectively outlawed one of the religion's "principal forms of devotion").

C. Equal Protection

Plaintiffs also argue that the Massachusetts Exclusions violate the protections afforded by the Equal Protection Clause. U.S. Const. amend. XIV. Plaintiffs argue that the Religious Exclusion violates equal protection guarantees because it infringes on the fundamental right to religious free exercise, disadvantages a suspect class, and fails the more searching rational basis review required in Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). They also challenge the Anti-Aid Exclusion under a suspect classification theory and a disparate impact theory. Because of the complexity of the various equal protection arguments presented, we will address the arguments one at a time, to the extent that is possible. In the end, we affirm the district court's grant of summary judgment against plaintiffs' equal protection claims.

1. Alleged Violation of the Equal Protection Fundamental Right to Free Exercise of Religion

Before moving to what we see as the substance of plaintiffs' equal protection claims, we first address their argument that the Massachusetts Exclusions restricts their fundamental right to free exercise of religion. Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts. Locke, 540 U.S. at 721, n. 3, 124 S.Ct. 1307 (citing Johnson v. Robison, 415 U.S. 361, 375, n. 14, 94 S.Ct. 1160, 39 L.Ed.2d 389, (1974)).[5] Because we held, above,

---

[5] In Locke, the Court quickly dismissed Davey's equal protection claims. The Court explained that "[b]ecause we hold ... that the program is not a violation of the Free Exercise Clause, ... we apply rational-basis scrutiny to his equal protection claims." Locke, 540 U.S.

that the Religious Exclusion does not violate the Free Exercise Clause, we apply rational basis scrutiny to the fundamental rights based claim that this exclusion violates equal protection. For the reasons stated throughout this opinion, we find that the Massachusetts Exclusions pass such review.

2. Plaintiffs' Claim that the Religious and Anti-Aid Exclusions Implicate a Suspect Classification

The central equal protection issue presented is whether the Massachusetts Religious Exclusion and Anti-Aid Exclusion impermissibly distort the political process to the disadvantage of religious individuals. Because we find that the Religious Exclusion does not draw distinctions based on a suspect classification, we hold that it does not violate the Equal Protection Clause.

Plaintiffs claim that the Religious Exclusion and Anti-Aid Exclusion draw distinctions on the basis of religion, which they argue is a suspect classification for purposes of

---

at 721, n. 3, 124 S.Ct. 1307. It bears clarifying that we do not read this statement to be a blanket rule that where a Free Exercise Claim fails, all equal protection claims based on the same facts must also fail. Looking back to Johnson v. Robison, we interpret this line of Supreme Court cases to apply only to the extent that the related equal protection claims are based on a theory that the law or governmental action in question "interferes with the fundamental constitutional right to the free exercise of religion." Johnson, 415 U.S. at 375, n. 14, 94 S.Ct. 1160. Other types of equal protection claims may have independent force, and must be considered accordingly. See Id. (finding that only rational basis review could be applied to plaintiff's equal protection claim insofar as it was based on interference with the fundamental right to freedom of religion, and then separately, though briefly, considering the merits of plaintiff's claim that "conscientious objectors are a suspect class deserving special judicial protection").

equal protection analysis.[6] However, even assuming that religious classification should be treated as suspect, we do not see how the Religious Exclusion and Anti-Aid Exclusion draw distinctions among Massachusetts citizens based on a suspect classification. The Religious Exclusion prohibits initiative petitions that concern "religion, religious practices or religious institutions." The Anti-Aid Exclusion precludes amendment by initiative of the Anti-Aid Amendment, which, in addition to containing Massachusetts' free exercise clause, prevents state funding for private institutions. On their face, the Exclusions simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs. They do not give preferential treatment to any particular religion. Id. Larson v. Valente, 456 U.S. 228, 246, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (holding, on First Amendment grounds, that "a state law granting a denominational preference" must be treated as suspect, and subjected to strict scrutiny). In short, this is not the classic violation of equal protection in which a law creates different rules for distinct groups of individuals based on a suspect classification. Id., *e.g.*, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879) (overturning state law which limited jury service to white men only).

The Supreme Court has, nevertheless, sometimes struck down facially neutral laws, which it recognized were

---

[6] But See Tribe, American Constitutional Law § 16-13 at 1465 (2d ed. 1988) ("Thus far, the cases have limited such strict scrutiny to instances of prejudice operating to the detriment of racial or ancestral groups."); See also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (naming race as the prime example of a suspect classification, and listing national origin, alienage, indigency and illegitimacy--but not religion--as other classifications that are sometimes considered suspect).

crafted to avoid facial discrimination. Id., e.g., Hunter v. Erickson, 393 U.S. 385, 387-91, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) (invalidating an amendment to the Akron, Ohio city charter, which, in addition to the usual vote by the city council, required approval by a majority of the city's voters for any ordinance regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry," even though the law "on its face treats [African-American] and white, Jew and gentile in an identical manner"); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (striking down a Washington initiative that prohibited school boards from requiring children to be bused to more distant public schools, while at the same time making exceptions for every imaginable impetus for busing other than racial integration). Unlike the Massachusetts Exclusions, the law in Hunter evinces a clear, solely detrimental effect on a suspect class. In Hunter, the law's one obvious result was to make it more difficult to pass laws prohibiting racial discrimination. Hunter, 393 U.S. at 391, 89 S.Ct. 557. Similarly, in Washington, although the initiative did not say so on its face, children could be bused to a more distant school for virtually any reason except racial integration. 458 U.S. at 471, 102 S.Ct. 3187. In contrast, the Massachusetts Religious Exclusion prevents both initiatives that would disfavor as well as those that might benefit religion, and the Anti-Aid Exclusion, in addition to preventing amendment of the clause precluding funding to private institutions, also prohibits amendment of Massachusetts' free exercise clause. Unlike the laws invalidated in Hunter and Washington, it is undeniable that the Massachusetts Exclusions both hinder and help the causes of the alleged suspect class.[7]

---

[7] Moreover, in both Hunter and Washington, the Supreme Court found that the laws were purposely aimed solely at unlawful goals. Washington, 458 U.S. at 471, 102 S.Ct. 3187 (noting that neither the

Certainly any form of invidious discrimination because of religion is forbidden. But "the Establishment Clause and the Free Exercise Clause[ ] are frequently in tension." Locke, 540 U.S. at 718, 124 S.Ct. 1307. States may properly refuse to enact laws that they reasonably believe may tend to establish religion. While the free exercise of religion is guaranteed, state support of religion is, in general, disfavored. And we know of no constitutional principle that prevents a state from determining that sensitive measures that relate to religion, religious practices, or religious institutions should not be made or initiated by the public initiative process but rather only via the legislature. A state might fear that such measures, if presented as public referenda, might be more likely to fuel religious strife or to result in enactments unfair to religious (or non-religious) minorities. Bearing these distinctions in mind, we are disinclined to extend the race-based Hunter and Washington lines of cases to this context, which so closely mirrors the mandates found in our federal Establishment Clause and Free Exercise Clause.

3. Plaintiffs Have Not Shown Discriminatory Intent

Plaintiffs further argue that the Anti-Aid Exclusion violates the Equal Protection Clause on a disparate impact theory. However, this argument fails because plaintiffs have not shown a discriminatory purpose behind the

---

initiative's sponsors, nor the lower courts, had any difficulty perceiving the racial aim of the initiative); Hunter, 393 U.S. at 392, 89 S.Ct. 557 (recognizing Akron's decision to "move slowly in the delicate area of race relations" as a euphemism for placing an obstacle in the path of progress against racial discrimination). We address the question of discriminatory purpose below in considering plaintiffs' disparate impact argument. We conclude that plaintiffs failed to present evidence sufficient to prove a uniquely discriminatory purpose in this case.

exclusion. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue," is not invalid under the Equal Protection Clause simply because it may disproportionately affect a suspect class. Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). "An unwavering line of cases from [the Supreme Court] holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation." Hernandez v. New York, 500 U.S. 352, 372-73, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). Plaintiffs present evidence that widespread anti-Catholic prejudice was a motivating factor behind passage of the original Anti-Aid Amendment in 1855, a fact which defendants do not dispute. However, the Anti-Aid Amendment was largely overhauled in 1917, with the support of 85 of the 94 Catholic delegates to the Constitutional Convention, and soon afterwards, the Anti-Aid Exclusion was passed with similarly broad support. No evidence has been offered that the exclusion was motivated by the same Anti-Catholic animus that impelled the passage of the original Anti-Aid Amendment. Plaintiffs cannot mix and match the intent behind one amendment and place it with the impact of a later, distinct amendment. Thus, without reaching the question of whether the Anti-Aid Exclusion has a disparate effect on religious individuals, we reject plaintiffs' equal protection disparate impact argument because plaintiffs fail to show the required discriminatory intent. Moreover, as we have already noted, religion has never been held to be a suspect classification. *Id.* supra note 6 and accompanying text.

4. Rational Basis Review Under Romer v. Evans

Having rejected plaintiffs' arguments that the Massachusetts Exclusions should be subjected to strict

scrutiny, we conclude by considering whether the exclusions survive rational basis review. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (striking down an amendment to the Colorado Constitution that would have precluded protection from discrimination on the basis of sexual orientation as failing rational basis review). In this case, we have no difficulty finding that Massachusetts' goal of preventing the establishment of religion is a legitimate one. Additionally, the chosen means clearly bear a rational relation to that end. Thus, the instant case is easily distinguished from *Romer*, where the Court found that passage of the Colorado amendment could only be explained by " 'a bare ... desire to harm a politically unpopular group,' " which " 'cannot constitute a legitimate governmental interest.' " Id. at 634, 116 S.Ct. 1620 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)).

III. Conclusion

For the foregoing reasons, the decision of the district court is affirmed.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-10377-GAO

MAYA BOYETTE, et al.,
Plaintiffs

v.

WILLIAM F. GALVIN, in his Capacity as Secretary of the Commonwealth of Massachusetts, et al.,
Defendants

MEMORANDUM AND ORDER
March 31, 2004

O'Toole, D.J.

The plaintiffs have a proposal to amend the Massachusetts constitution, and they would like to make use of the initiative procedure available under that constitution to put the proposal to a vote by the State's electorate. Under the Massachusetts initiative procedure, before a question can be put to the electorate, the State's attorney general must certify that it is a proper question to be placed on the ballot. This involves determining whether certain procedural steps have been fulfilled. It is also involves comparing the subject matter of the initiative proposal to a list of matters which the constitution by express provision excludes from eligibility for consideration through the initiative process.

The plaintiffs are the parents of children who attend private schools sponsored or supported by religious institutions. They favor the enactment of programs to provide direct or indirect public financial support for the education expenses, such as by means of vouchers or scholarships. A particular provision of the Massachusetts constitution stands in the way of the adoption of such programs, however. Amendment Article 18 of the Massachusetts constitution prohibits any public financial support for private primary or secondary schools (though not private institutions of higher learning). (Amendment Article 18 is commonly referred to at the "Anti-Aid Amendment," because it forbids "aid" to private schools.) In order to permit legislative approval of a measure making available any of the programs the plaintiffs seek to have adopted, the Anti-Aid Amendment itself would have to be amended so that programs they advocate can be considered on their merits by the legislature, or perhaps, by the people via the initiative process.

Unfortunately for the plaintiffs and others of like mind, however, the Massachusetts constitution prohibits initiative petitions that would amend the Anti-Aid Amendment (the "Anti-Aid Exclusion"). Mass Const. Amend. Art. 48, pt. 2 § 2. Moreover, the constitution prohibits initiative petitions that concern "religion, religious practices or religious institutions" (the "Religious Exclusion"). Id. When the plaintiffs presented their petition seeking to amend the Anti-Aid Amendment, the attorney general ruled that the subject matter of the petition precluded it form being placed on the ballot as an initiative, citing both the "Anti-Aid Exclusion" he "Religious Exclusion." In this suit, the plaintiffs seek a declaration that enforcement of the Anti-Aid and Religious Exclusions as to their proposed initiative petition violates the United States Constitution, and they further seek appropriate injunctive relief.

The plaintiffs' first argument is that the subject matter restrictions imposed by the Anti-Aid and Religious Exclusions with respect to the initiative petition process are impermissible government limitations on their freedom of speech. They rely heavily on cases analyzing what restrictions the government may impose on speech in various contexts.

In a nutshell, the legitimacy of governmental restrictions on speech depends to a great extent on the circumstances under which the speech occurs (or, perhaps more accurately, would occur if not for the restriction). The cases discuss a three-level hierarchy of "forums," with an ascending level of restriction permitted as one proceeds from the most open and unregulated to the least open and more properly regulated forums. First, there is the traditional public forum that is open to virtually unrestricted speech, such as a public park or a public sidewalk. Except for reasonable regulation of the "time, place or manner" of the expressive occasion, and some other qualifications not relevant here (such as "fighting words" or obscenity), the government must generally allow all comers to say what they want in such forum. Next is the "designated" public forum, a place or means of communication where the government purposely permits public participation. An assembly hall in a municipal building, for example, may be made generally available to the public for private uses- lectures, performances, and the like. In such cases, the rules are generally the same as for "traditional" public forums. Any limitation that is based on the content or subject matter of speech in a forum designated as a place for or means of communication must serve a compelling governmental interest and must be tailored to serve that interest without restricting speech or expression not implicating that interest. Finally, there is the "non-public" forum, a place or facility not open broadly

to the public for the communication of ideas. The government may set more stringent rules for expression in a non-public forum, such as limiting expression to the specific purposes of the forum, so long as it does not favor or disfavor expression based on the public officials' approval or disapproval of the point of view of the expression. An internal communications facility in a government workplace-like teachers' mailboxes in a public school-would be an example.

The plaintiffs assert that their proposed use of the initiative procedure to present for a vote by the electorate of the Commonwealth a petition that would amend the Anti-Aid Amendment is "speech" protected by the First Amendment principles articulated in the "forum" cases. The difficulty with this theory, however, is that the presentation of a petition to the electorate is significantly more that simply the communication of ideas or viewpoints, though it certainly includes and stimulates such communication. Beyond communication, the initiative process is a functional exercise in lawmaking. By invoking the initiative process, the plaintiffs want to do more that just say something; they want to do something-achieve electoral approval of an amendment to the Massachusetts constitution. The effect of the limitations imposed by the initiative exclusions challenged here is to preclude direct popular lawmaking as to certain subject areas. Any restriction on the plaintiffs' desired "speech" through the initiative process is a necessary incident, but an incident nonetheless, of the limited availability of that process as an instrument of lawmaking.

The challenged provisions of the constitution impose no restriction on speech either in favor or against any initiative petition that is permitted. Case analyzing restrictions on "only" speech in various forums or channels of

communication-even those addressing speech specifically in support of initiative petitions, see Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (199); Meyer v. Grant, 486 U.S. 414 (1988)- are not directly pertinent to deciding the propriety of restrictions on speech that is more than just speech because it is not only meaningful, but functional.

The Massachusetts constitution established a representative, "republican" form of government, with legislative, executive4 and judicial branches. See generally, Mass. Const. Pt. 2 ("The Frame of Government"). The power to make laws is granted generally to the legislative branch. id., ch. 1§ 1, art. 4, which is composed of senators and representatives elected from geographically described districts. Id., §§ 2 and 3. As the result of a constitutional convention held in 1917 and 1918, the constitution was amended to provide for direct popular lawmaking by way of initiative petitions (as well as for direct popular review of legislative lawmaking by way of referendums). Id. Amend. Art. 48

However, the initiative process is not made available for direct lawmaking by the people without limitation. It may not be used to adopt laws dealing with a number of specified topics, including those at issue in this case. Some of the matters excluded from consideration by means of an initiative petition relate to the frame or organization of the government itself. So, for example, matters affecting the judicial branch may not be the subject of an initiative. Similarly, the legislature's appropriation power is protected by excluding measures that would make specific appropriations from the state treasury. Other exclusions prevent initiatives that would weaken or undercut particular individual rights enumerated in the constitution's declaration of rights. The constitutional article establishing

the initiative may not itself be the subject of an initiative petition.

The initiative procedure can thus be seen as an exception to the general rule that lawmaking will accomplished by the legislature. Yet in creating that exception, Amendment Article 48 also created exceptions to the exception, and for those matters the "usual," representative procedures apply. There is no reason to think that the federal Constitution requires the States to adopt an "all or nothing" initiative procedure- that is, that Massachusetts either must permit the initiative to be used for all lawmaking purposes without restriction or not permit it at all. To be fair, the plaintiffs do not suggest otherwise. Rather, they argue that the rules against content-or viewpoint-based discrimination in the "only speech" case ought likewise to be used to limit the power of the State to close the initiative procedure to some purposes while opening it to others.

As noted above, it is a sufficient reason not to regard those cases as controlling that the initiative's functional process of lawmaking is significantly and substantially different from a place or facility that has been opened, by tradition or designation, for the dissemination and discussion of ideas. Beyond that, the rules are unworkable as a practical matter in the initiative context because of a fundamental conflict with the proposition that the initiative procedure need not be universally available. It seems obvious that if some matters are to be permitted and others not, the description of either category would be done by reference to content or subject matter, not only as a matter of the requirements of language, but also because topical grants or prohibitions of lawmaking powers are usual and traditional. Thus, for example, like the First Amendment itself, the first section of the Anti-Aid Amendment, not

here at issue, provides, "No law shall be passed prohibiting the free exercise of religion." That is a subject matter (or viewpoint) restriction on the lawmaking power. So at least some topical exclusions must be okay. Are others not? And if one is and another is not, what standards could be used for judging which is which?

Rules of decision cognate to those in the speech cases would not be useful. To the extent that those rules would prohibit exclusion based on the content or subject matter of the proposed initiative petition, they would be inconsistent with the necessary principle just discussed- defining the scope of the initiative procedure by reference to the subject matter of proposed petitions. An attempt to refocus the test from "Content" discrimination to "viewpoint" discrimination would also be unsuccessful because for purposes of defining what kinds of petitions are excluded there is not necessarily much difference between a broad what kinds of petitions are excluded there is not necessarily much difference between a broad definition (of subject matter) and a narrow one (of viewpoint). For instance, the exclusion that bars consideration of petition that would abolish the right to jury trial could easily be thought of either as an exclusion based on the content or subject matter of the petition (the abolition of the right to jury trial) or as one based on its viewpoint (that the right to jury trial should be abolished).

Another theory that better suits prophylaxis against mischief in the classification of approved and disapproved topics for petitions is one drawn from equal protection doctrine, which is an alternate basis proposed by the plaintiffs for the relief they seek. But while the possibility seems more congenial at first blush, in the end that theory likewise must be rejected.

The plaintiffs rely mainly on two cases, Hunter v. Erickson, 393 U.S. 385 (1969) and Washington v. Seattle School Dist., 458 U.S. 457 (1982), for support for their proposition that "distortions of the political structure that impose a hurdle on one group seeking legislation in the political process that is not similarly imposed on other groups constitutes a denial of equal protection." Pls.' Mem. In Supp. Of Mot. From Summ. J. at 37. The quoted language from the plaintiffs' brief somewhat overtakes the holdings of the cases cited. In both cases, the Supreme Court struck down measures that made it more difficult for a racial minority to achieve the enactment of beneficial legislation than it was for sponsors of other legislation generally. Since the measures impacted a racial minority, the classification was deemed "suspect" under conventional equal protection theory and thus subject to "strict scrutiny." The plaintiffs cannot successfully argue that Anti-Aid and Religious Exclusions, individually or in tandem, operate to "classify" the plaintiffs by reference to their religious beliefs or practices (classification that, if it occurred, would be "suspect"). The plaintiffs are the parents of children attending private schools operated under the auspices of religious institutions. According to the amended complaint, although all the named plaintiffs have enrolled their children in Catholic parochial schools, not all the plaintiffs are Catholics themselves. To the extent they have a group identity, it is not defined by membership in a particular religious faith, but rather in the shared faith in the educational opportunities offered by Catholic and other religious-sponsored schools. At the risk of stating the obvious, other members of the same religious faiths as the plaintiffs do not share the plaintiffs' interest in private schooling for the children and instead enroll them in public schools.

Another trigger for strict scrutiny under equal protection theory is when the challenged governmental action has the effect of impermissibly "burdening" a "fundamental right." But there us no such burdening here because the plaintiffs have not identified a fundamental right that has been harmed by the Anti-Aid and Religious Exclusions. In particular, the exclusions from the initiative process that the plaintiffs complain of do not implicate the plaintiff's opportunity to vote on any matter that does not appear on the ballot, but rather their opportunity to have a question placed on the ballot in the first place. That interest is not the same as the "right to vote" that is recognized in case law as a "fundamental right". And as noted earlier, there is no recognized federal constitutional "fundamental right" to have a matter accepted by a State for inclusion in the initiative process of lawmaking.

Nor is the plaintiffs' fundamental right to practice their chosen religion affected by the exclusions. The exclusions have nothing to do with the practice of religion, even if that could be broadly understand as including the enrollment of children in religious-sponsored schools. The exclusions pertain to the initiative ballot, not to school choices.

Another equal protection case cited by the plaintiffs is Romer v. Evans, 517 U.S. 620 (1996). In that case, the Supreme Court concluded that a state constitutional provision that prohibited the enactment, either at the state or local level, of measures regulating discrimination against persons on the basis of sexual orientation placed an obstacle in the path of homosexuals that did not exist for persons seeking other legislations. Id. at 627. The Court concluded that the distinction lacked a rational basis, so that even though there was neither a suspect classification nor a fundamental right at stake, the constitutional provision at issue violated equal protection principles.

It is difficult to extrapolate a principle from Romer that might serve as a basis for granting similar relief to the plaintiffs. One difference between the cases that seems significant is that in Romer the obstacle placed in the way of supporters of possible anti-discrimination legislation was that they were required to amend the state constitution to eliminate the prohibition against such legislation, rather than simply succeeding at the task of obtaining enactment of such legislation, either at the state or local level. That problem may be like the one the plaintiffs face in attempting to obtain the enactment of some sort of public financial aid to persons like themselves who have children enrolled in private religious schools, because in order to have such legislative proposals enacted, they must first by constitutional amendment eliminate the Anti-Aid Amendment's prohibition of such support. But what is at issue now is not the constitutional validity of the Anti-Aid Amendment itself. This Court has previously ruled that the plaintiffs lack standing to make that challenge. Rather, what is at issue at this stage are only the Anti-Aid and Religious Exclusions to the initiative procedure. Those provisions do not change the level at which desired legislation may be enacted; they simply foreclose use of the initiative procedure to amend the Anti-Aid Amendment. By operation of the exclusions, the plaintiffs must avail themselves of the other process provided for amending the constitution, through the legislature. With or without resort to the initiative, the plaintiffs still must achieve amendment of the constitution.

Nevertheless, assuming in the plaintiffs' favor that Romer would require Massachusetts to justify the exclusions under the "rational basis" test, they easily pass that test. As the record of the debates of the Massachusetts Constitutional Convention of 1917--1918 indicate, the

adoption and contours of the initiative and referendum provisions of the constitution were resolved after extended discussion and compromise. They reflect the majority consensus that the initiative and referendum should not be available without limitation for lawmaking on any and all topics, and specifically that the initiative should not be available for all proposals to amend the constitution, including the newly amended Anti-Aid Amendment. These exclusions reflect an evident judgment that some questions are better resolved in a process that permits extended debate and compromise than in a process that essentially puts a fixed proposition to the general electorate for a single up or down vote. The wisdom and prudence of the exclusions are a matter on which opinion could reasonably be divided, but it cannot be said that insisting that certain subjects are better addressed in the traditional way of representative government before they are put on the state-wide ballot is an irrational idea.

The plaintiffs make the additional argument that the Religious Exclusion violates the Free Exercise Clause of the First Amendment by placing a hurdle in front of those who want to propose initiative petitions that deal with "religion, religious practices, or religious institutions" that is not placed in front of persons seeking to propose other initiative matters. The argument lacks merit, substantially for the reasons put forward by the defendants. As noted above, the exclusions bear on the plaintiffs' ability to invoke the initiative process, not on their exercise of religion. Recently, the Supreme Court held that the refusal of the State to subsidize religious studies does not violate the Free Exercise Clause. Id. Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). It surely follows that it is not a violation of that Clause for the State to limit consideration of the question whether to subsidize or not to the established representative process, rather than

the initiative process.

In any event, the Religious Exclusion does not burden the plaintiffs (or religious people generally) differently from other citizens. It equally precludes both proposals that would be friendly to religion or religious institutions, such as proposals the plaintiffs might make, and proposals that would be hostile to religion. Put another way, the exclusion keeps from the initiative process both proposals tending to inhibit the free exercise as well as proposals tending to forestall any establishment of religion, in a way that is just as balanced and neutrally phrased as is the First Amendment itself.

The plaintiffs' spirited and thoughtful attack on the initiative exclusions is in the end unavailing. The plaintiffs' motion for summary judgment in their favor is DENIED, and the defendants' cross-motion for summary judgment is GRANTED.

A declaratory judgment shall enter that the Anti-Aid and Religious Exclusions contained in Amendment Article 48 to the Massachusetts constitution are not invalid as violative of the First and Fourteenth Amendments to the United States Constitution. Judgment shall enter in favor of the defendants under all counts of the amended complaint.

It is SO ORDERED.

March 31, 2004
Date

/s/ George A. O'Toole, Jr.
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASACHUSETTS

CIVIL ACTION NO. 98-10377-GAO

MAYA BOYETTE, MONIQUE BOYETTE, ppa PATRICIA BOYETTE, and PATRICIA BOYETTE, in her own capacity; MICHAEL WIRZBURGER, ppa SUSAN WIRZBURGER, and SUSAN WIRZBURGER, in her own capacity; ELIZABETH ZUBRICKI, ppa RITA ZUBRICKI, and RITA ZUBRICKI, in her own capacity,
Plaintiffs

v.

WILLIAM F. GALVIN, Secretary of the Commonwealth of Massachusetts, et al.,
Defendants.

MEMORANDUM AND ORDER
February 12, 2001

O'TOOLE, D.J.

The defendants have moved to dismiss for want of standing the plaintiffs' challenge to two provisions of the Constitution of the Commonwealth of Massachusetts which allegedly violate the plaintiffs' federal rights. The first challenge is to the so-called "Anti-Aid Amendment," Mass. Const. amend art. XVIII, § 2, which prevents the State from giving financial aid to private primary and secondary schools. The second challenge concerns provisions of the Massachusetts Constitution that exclude certain subject matter from being presented to voters by initiative petitions. See Mass. Const. amend. art. XLVIII, Init., pt. 2, § 2 (Initiative Petition Provisions). In particular, Article

XLVIII of the Massachusetts Constitution expressly excludes both the Anti-Aid Amendment itself and any matter dealing with "religion, religious practices, or religious institutions" from being the subject of an initiative petition. Id. For the reasons below, the defendants' motion to dismiss is GRANTED as to the first challenge and DENIED as to the later.

The plaintiffs are four school-aged children and their parents. The children either attend or wish to attend parochial schools, either for educational or religious reasons. Their parents want to seek funding from the State, via the legislative process, that would help reduce the often significant expense of private school education. The harm alleged by the plaintiffs is not the want of funding itself, but rather their perceived inability to participate in the political processes to the full extent enjoyed by other citizens. The gravamen of the plaintiffs' complaint is that, with respect to the issues they are concerned about, they have been discriminatorily shut out of the democratic process by the Anti-Aid Amendment and the Initiative Petition Provisions, separately and in combination, in violation of their rights under the United States Constitution.

The defendants have moved to dismiss the complaint on the ground that the plaintiffs lack standing to bring the claims asserted.

> "The 'irreducible constitutional minimum of standing' contains three requirements. First and foremost, there must be alleged...an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability – a likelihood that the requested relief will redress the

> alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-104 (1998) (internal citations omitted). The defendants focus on the first criterion and argue that the plaintiffs have not suffered and "injury in fact."[1]

When considering a motion for dismissal for lack of standing, this Court must credit the allegations in the complaint and draw all reasonable inferences in the light most favorable to the nonmoving party. See Warth v. Seldin, 422 U.S. 490, 501 (1975) (all material allegations in the complaint are to be regarded as true); see also Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 971 (1st Cir. 1993).

A. The Anti-Aid Amendment

In its current form, the Anti-Aid Amendment bars, among other things, use of public funds to support any private primary or secondary school.[2] The plaintiffs argue

---

[1] The defendants argue that the plaintiffs lack standing, as none of the required three elements are satisfied in the plaintiffs' complaint. Because the injury-in-fact element is determinative, this Court does not reach the issues of causation or redressability.

[2] "No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and

that the Anti-Aid Amendment, enacted in the 1800s by Massachusetts lawmakers tainted with anti-Catholic bias, is a surviving artifact of religious discrimination. They contend the amendment currently operates to violate the Free Speech, Free Exercise, Right to Petition, and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Their standing, they say, is conferred by their Equal Protection and Establishment Clause claims. They argue that the Anti-Aid Amendment specifically harms them because it is "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government" and is, therefore "a denial of equal protection of the laws in the most literal sense." Romer v. Evans, 517 U.S. 620, 633 (1996); see also Northeastern Fla. Chapter or Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993). According to the plaintiffs, the history of the Anti-Aid Amendment, which they assert was enacted to impose a disability of a particular kind specifically upon Catholics, illustrates how the provision serves to make it more difficult for one particular group to seek aid from the government.[3] Because the Anti-Aid Amendment is a

---

for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; an no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions."

Mass. Const. amend. art. XVIII, § 2

[3] The plaintiffs interpret the United State Supreme Court opinion in Romer, 517 U.S. at 620, as bolstering their position. In Romer, the Supreme Court held that an amendment to the Colorado Constitution

barrier for funding religious private primary and secondary schools, thus those "seeking to challenge the barrier need not allege that [they] would have obtained the benefit but for the barrier in order to establish standing." Northeastern Fla. Chapter, 508 U.S. at 666. All that need be alleged, the plaintiffs argue, is the existence of a discriminatory barrier and their desire to compete for state funding. See, Id.

While mindful that a generous reading is to be afforded complaints upon a motion to dismiss for want of standing, this Court cannot accept the plaintiffs' allegation that the Anti-Aid Amendment is in its present form, discriminatory on its face. Indeed, the plaintiffs' urging of such a construction is based not upon its present text – i.e. its "face" – but rather upon the Anti-Aid Amendment's nefarious history. Even if the Amendment may have, at one time, evidenced a discriminatory animus against religious in general, or against a particular religion, the plaintiffs' emphasis on history ignores the crucial fact of the amendment's current language. Over the years, the Anti-Aid Amendment has been revised to make it applicable to *all private* primary and secondary schools, not just to religious – let alone Catholic – schools. In 1917, for example, language was removed from the Anti-Aid Amendment that had prevented state funding of "any

---

was invalid because it "impos[ed] a broad and undifferentiated disability on a single named group" and the amendment "lack[ed] a rational relationship to legitimate state interests." 517 U.S. at 632. However, the Anti-Aid Amendment does not identify a single group and state, as was the case with the constitutional provision at issue in Romer, but in contrast restricts public funding to a range of potential recipients, including not only private religious primary and secondary schools but also "any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both."

Mass. Const. amend. art. XVIII, § 2.

religious sect for the maintenance exclusively of [the sect's] own schools." Mass. Const. amend. art. XVIII, historical notes (West 1997) (emphasis added). Whether such language could survive constitutional challenge is not the question here; it was stricken from the Commonwealth's Constitution more than 80 years ago. Only the current version is subject to scrutiny . The current version of the Anti-Aid Amendment does not erect a barrier against the funding of just religious private primary and secondary education. The barrier, so called, generally prevents state funding of any private primary and secondary education.

The defendants are therefore correct to point out that the plaintiffs' challenge to the Anti-Aid Amendment is a generalized grievance shared by many in the community, not a claim of injury in fact to a discrete group. Such generalized grievances are not the matter of "cases" or "controversies" to be resolved between adversary litigants, but rather are broader political matters best addressed through the legislature. See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982). To litigate this issue would, according to the defendants, "transform the federal courts into no more than a vehicle for the vindication of the value interest of concerned bystanders." See Allen v. Wright, 468 U.S. 737, 756 (1984) (citations and internal quotations omitted). Without identifying a distinct, concrete, and palpable injury, see Steel Co., 523 U.S. at 103, the plaintiffs fail to allege an "injury in fact" sufficient to give them standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (an injury in fact is an invasion of a legally-protected interest that is concrete, particularized, actual or imminent and not conjectural or hypothetical).

Moreover, while at least two of the plaintiffs say they "continue to seek legislation" to assist parents with the costs associated with private, parochial education, no such

legislation is pending. See Zubricki Decl. ¶ 2; Wirzburger Decl. ¶ 2. The plaintiffs do not argue that they have initiated funding proposals in the legislature that have been, or are likely to be, thwarted by the Anti-Aid Amendment. In essence, the plaintiffs attempt to create standing out of little more than their anticipation that a hypothetical funding proposal, were it offered, would be defeated by what they claim to be an unconstitutional amendment. This is not enough to make their complaint justiciable. Compare Raines v. Byrd, 521 U.S. 811, 812 (1997) (dismissing a challenge against the Line Item Veto, after it was passed, but before it was applied) with Clinton v. City of New York, 524 U.S. 417, 429-30 (1998) (finding standing for those who were injured by the application of the Line Item Veto).

The existence of an allegedly unconstitutional provision does not, by itself, create a ripe controversy, unless and until the provision is actually applied to harm the plaintiffs in a concrete way. See Reno v. Catholic Soc. Servs., 509 U.S. 43, 57-59 (1993) (challenge to government agency regulation "would ripen only once [plaintiff] took the affirmative steps that he could take before the [government] blocked his path by applying the regulation to him"). In this case, absent a particular funding proposal or legislative enactment providing for the funding of religious education, it is inappropriate to predict whether any such enactment would be barred by the Anti-Aid Amendment. While case law may suggest an unfavorable result to any funding proposal the plaintiffs might present, see Opinion of the Justices to the Senate, 514 N.E.2d 353 (Mass. 1987), the plaintiffs must have a definite and present intention to pursue such a proposal. See Rhode Island Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999) (requiring concrete plans to engage in a prohibited activity

before standing can be found in a pre-enforcement action).[4]

The plaintiffs have failed to allege an injury in fact with respect to the Anti-Aid Amendment. Absent this critical element of judicial standing, that aspect of the complaint cannot be maintained.

B. The Initiative Petition Provisions

The plaintiffs next challenge the provisions of the Massachusetts Constitution that exclude certain subjects from being considered by the voters of the Commonwealth via the initiative petition process. Mass. Const. amend. art. XLVIII, Init., pt. 2, § 2. An initiative petition allows a group of voters, subject certain restrictions, to place amendments to the Massachusetts Constitution before the people at a statewide general election.[5] See Mass. Const. amend. art. XLVIII, pt. 1. In effect, the initiative petition process enables citizens to bypass several legislative hurdles and more easily change the Commonwealth's

---

[4] This may be all the more the more true where, as here, the Courts have adopted a three part test for assessing whether a particular funding proposal is in violation of the Anti-Aid Amendment. See Helmes v. Commonwealth, 550 N.E.2d 872, 876 (Mass. 1990) (assessing whether (1) the purpose or (2) the effect of the statute is to substantially aid private schools, and (3) whether the statute avoids political and economic abuses designed to be thwarted by the Anti-Aid Amendment)(quoting Commonwealth v. School Comm. Of Springfield, 417 N.E.2d 408, 414 (Mass. 1981)). The variable outcomes possible from application of this test demonstrate the danger in predicting the result of an Anti-Aid Amendment challenge to an amorphous funding proposal.

[5] Initiative petitions meeting the requirements are presented to the legislature. If in two consecutive sessions of the legislature, at least 25% of the membership agrees, the amendment will then be presented to the people for ratification. See Mass. Const. amend. art. XLVIII, Init., pt. 4, §§ 4-5.

Constitution.[6] There are, however, a number of subjects that are specifically excluded from this expedited process. Among these are any petitions that concern the Anti-Aid Amendment or that deal with "religion, religious practices or religious institutions." See Mass. Const. amend. art. XLVIII, Init., pt. 2, § 2. The plaintiffs argue that this language, because it appears to disfavor religion explicitly, constitutes a present injury sufficient of confer standing under either their Equal Protection or Establishment Clause claims in the form of a discriminatory barrier to governmental processes. See Northeastern Fla. Chapter, 508 U.S. at 666.

Unlike their challenge to the Anti-Aid Amendment, it appears that the plaintiffs have taken all the affirmative steps available to them in order to test the Initiative Petition Provisions. See Catholic Soc. Servs., 509 U.S. at 59 (holding that "a [plaintiff's] claim would ripen only once he took the affirmative steps" possible before application of a government regulation stopped his progress); see also Riva v. Commonwealth of Massachusetts, 61 F.3d 1003, 1010 (1st Cir. 1995) (ripeness may be satisfied by finding that the application of the statute is "inevitable (or nearly so)"). The plaintiffs have gathered enough signatures to create an initiative petition which seeks to do that which Article XLVIII expressly forbids – amend the Anti-Aid Amendment. That effort has been thwarted by official government action based upon the very restrictions of which the plaintiffs complain.

Before any initiative petition may be presented to the Legislature, the Commonwealth's Attorney General must certify that the petition pertains to a permitted subject.

---

[6] The more traditional method of amending the Massachusetts Constitution is through the legislative petition process. For an amendment to be submitted to Massachusetts voters for their approval a legislative petition must be approved by a majority of legislators in two successive joint sessions of the legislature. See Complaint ¶ 28.

That is to say, the Attorney General must certify that the initiative petition does not pertain to matters excluded from consideration by the relevant provisions in the Massachusetts Constitution. See Mass. Const. amend. art. XLVIII, Init., pt. 2, § 3. After the plaintiffs delivered their petition to the Attorney General with the requisite number of signatures, he forwarded the petition to the legislature, in compliance with an order of this Court agreed to by the parties. However, the Attorney General refused to certify that the petition pertained to a permitted subject. Rather, he stated that the plaintiffs' "petition seeks to amend the State's 'Anti-Aid Amendment,' Mass. Const. amend. art. XVIII, which Article XLVIII expressly forbids, and the petition also explicitly relates to 'religious institutions,' another matter expressly excluded from the initiative process by Article XLVIII." See Pls.' Mot. For Prelim. Inj., Attach. G.

The defendants effectively concede that these events created an actual controversy. Their prior objection had been that the plaintiffs' "claim will not ripen into an actual controversy...unless and until the Attorney General declines to certify that petition based on the challenged provisions of in Initiative Amendment." See Defs.' Reply Mem. in Further Supp. of Mot. To Dismiss, at 2. These conditions have since been satisfied.

More recently, however, the defendants advanced the argument that the complaint has lost its ripeness and is now nonjusticiable. See Defs.' Third Supp. Mem. Supp. Mot. to Dismiss Am. Compl. The defendants contend that since the initiative petition was not acted upon by the joint session of the Massachusetts legislature last term, it is therefore "dead." However, the death of the initiative petition was not by the plaintiffs' own hand, but rather a

direct result of the legislature's act.[7] In other words, the barrier the plaintiffs seek to challenge was effective. Because the barrier is effective, the plaintiffs are able to complain of an injury in fact sufficient to grant them standing. See Northeastern Fla. Chapter, 508 U.S. at 664 (citing Clements v. Fashing, 457 U.S. 957 (1982)).

The merits of the claim are not presented now for decision. On the motion that is presented, the Court is satisfied the plaintiffs'[sic] have standing to challenge the Initiative Petition Provisions of the Massachusetts Constitution.

Conclusion

For the foregoing reasons, the defendants' motion to dismiss for lack of standing is GRANTED as to the Anti-Aid Amendment and DENIED as to the Initiative Petition Provisions.

It is SO ORDERED.

February 12, 2001 /s/ George A. O'Toole, Jr.
DATE

[7] The Senate Counsel advised the Clerk to take no action on the plaintiffs' petition since, in Counsel's view, a petition not certified by the Attorney General cannot be considered "properly before the Legislature under Article 48." See Defs.' Third Supp. Mem. Supp. Mot. to Dismiss Am. Compl., n. 1.

THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-10377-GAO

MAYA BOYETTE, *et al.*,
Plaintiffs,

v.

WILLIAM F. GALVIN, *et al.*,
Defendants.

ORDER
May 5, 2000

O'TOOLE, D. J.

The plaintiffs seek to amend the Massachusetts Constitution by means of an initiative petition to permit the State to provide some financial assistance to parents whose children attend private religious primary and secondary schools, but their efforts to have the matter approved for inclusion in a general election ballot have been stymied by the refusal of the state Attorney General to certify that the petition is proper. As a result, in this action under 42 U.S.C. §1983, the plaintiffs challenge two provisions of the Massachusetts Constitution on the ground that they violate the plaintiffs' federal constitutional rights. The first challenge is to the so-called "Anti-Aid Amendment," Mass. Const. amend. Art. 18, which prevents the state from giving aid to private primary and secondary schools. The second challenge (and for the present purposes the more important) concerns provisions of the Massachusetts Constitution that exclude certain subjects from being considered by the voters on initiative petitions. See Mass. Const. amend. art. 48, pt. 2 § 2. In particular, article 48 expressly excludes

both the Anti-Aid Amendment itself and any matter dealing with "religion, religious practices, and religious institutions" from being the subject of an initiative petition.

Before any initiative petition may appear on the general election ballot, the Commonwealth's Attorney must certify that the petition pertains to a permitted subject, or, put the other way around, does not pertain to a matters excluded from consideration by means of an initiative petition. See Mass. Const. amend. art. 48, pt. 2 § 3. The Attorney general has refused to certify the plaintiffs' proposed initiative petition because "the petition seeks to amend the state's 'Anti-Aid Amendment,' Mass. Const. amend. art. 18, which Article 18 expressly forbids, and the petition also explicitly relates to 'religious institutions,' another matter expressly excluded from the initiative process by Article 48." See Wirzburger Decl., Ex. G. The Attorney General's assessments of both the petition and the plain language of Article 48 are correct.

The plaintiffs contend, however, that the relevant exclusions violate freedoms guaranteed under the First and Fourteenth Amendments of the United States Constitution. They have moved for entry of a preliminary injunction requiring the Attorney general to certify the petition so that it may be considered, as Article 48 requires, by the Massachusetts legislature. The last day for placing the matter before the legislature this year in Wednesday, May 10.

"In considering a request for preliminary injunction, a trail court must weigh several factors: (1) the likelihood of success on the merits, (2) the potential for irreparable harm to the movant, (3) the balance of the movant's hardship if relief is denied versus the nonmovant's hardship if relief is granted, and (4) the effect of the decision on the public

interest." Philip Morris, Inc. v. Harshbarger, 159 F. 3d 670, 673 (1st Cir. 1998) (citations omitted).

The Attorney General relied on both the Anti-Aid exclusion and the "religious institutions" exclusion as independent grounds for refusing to certify the initiative petition. Therefore, the plaintiffs must show that both exclusions are unconstitutional in order to be successful. On the present record, I conclude that the plaintiffs have not adequately demonstrated a likelihood of success on the merits of their challenge to Article 48's "religious institutions" exclusion. In light of this conclusion, it is unnecessary to reach the plaintiffs' other contentions.

Free Exercise

The plaintiffs' claim that Article 48's "religious institutions" exclusion infringes their rights of free exercise of religion does not have a reasonable likelihood of success. The exclusion bars anyone from using an initiative petition either to harm or to benefit a religious institution.[1] It is neutral on its face, and appears to protect the free exercise of religion, rather than infringe it. See Employment Division v. Smith, 494 U.S. 872, 879-80 (1990). Contrary to the plaintiffs; argument, it is not at all clear that Article 48 burdens religious beliefs or practices in any way. See Wisconsin v. Yoder, 406 U.S. 205, 215-19 (272).

Free Speech

The plaintiffs; claims regarding free speech rights are

[1]This makes it unlikely that the "religious institutions" exclusion of Article 48 can be successfully challenged via the Establishment clause. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah 508 U.S. 520, 532 (`1993).

equally dubious. There is a difference between the speech created during the process of circulating petitions, see Buckley v. American Constitutional Law Found., 525 U.S. 182, 186-87 (1999), which is not implicated here, and the process by which laws are enacted, such as the initiative petition. The plaintiffs' attempts to construe the process of enactment as a public forum are unpersuasive. If accepted, they would destabilize a whole host of subject matter of other restrictions routinely applied in the ordinary process of enacting laws. Finally, the availability of other possible procedures to amend the Anti-Aid Amendment militates against the injunction sought.

Equal Protection

Despite the plaintiffs' attempt to persuade otherwise, it is not at all clear that Article 48 singles out any minority for special treatment concerning the political process. See Romer v. Evans, 517 U.S. 620, 631 (1996). The "religious institutions" exclusion of the Article 48 applies equally to all and therefore does not make access to the political process any more difficult for any group.[2] Further, Article 48 is rationally related to the legitimate government interest of precluding direct referendum-based lawmaking on certain potentially controversial and divisive issues; while a state may not bar debate about controversial issues, it may limit the use of a particular form of lawmaking to specific issues.

Balance of Harm

Even if it were assumed that the plaintiffs' allegations of First Amendment violations are meritorious and

---

[2] The "religious institutions" exclusion implicates laws about religion; it does not disable religious institutions themselves from sponsoring an otherwise proper initiative petition.

therefore presumptively irreparable, see Elrod v. Burns, 427 U.S. 347. 373 91976), it must also be noticed that there would be serious harm to the defendants from the erroneous entry of an injunction. The plaintiffs ask this Court to require the Attorney General to ignore the plain text of the state Constitution. See Mass. Const. amend. art. 48, pt. 2 § 3. Principles of comity ands federalism urge particular caution in this area, and it should only be done when the justification for such a command is clear. The Second Circuit has recently held that plaintiffs are to be held to a heightened standard of likelihood of success on the merits when seeking a mandatory injunction to override "governmental action taken in the public interest pursuant to a statutory or regulatory scheme." Tunick v. Safir, -- F.3d--, 2000 WL 342706, *2 (2nd Cir.) (Calabresi, J.) (quoting Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1996)). Moreover, this Circuit disfavors preliminary injunctions designed, as the one here, to disturb the status quo. See United Steelworkers v. Textron, Inc. 836 F.2d 6, 10 (1st Cir. 1987).

The plaintiff's motion for a preliminary injunction is DENIED.

It is SO ORDERED.

May 5, 2000
Date

/s/ George A. O'Toole, Jr.
United States District Judge

O'TOOLE, D.J.
MOTION ALLOWED
BY THE COURT

/s/ Timothy Rooney
deputy clerk 9/02/99

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Maya Boyette, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	No. 98-CV-GAO
	)	
William F. Galvin, et al.,	)	
	)	
Defendants	)	
	)	

ASSENTED-TO MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs respectfully move this Court for a preliminary injunction, as described more fully below. Defendants' counsel has told Plaintiffs' counsel that Defendants will be filing a response assenting to this motion.

As set forth in Plaintiffs' Response to Defendants' Second Supplemental Memorandum, Plaintiff Suzan Wirzburger and 14 others filed a citizen initiative petition with the required initial signatures with the Attorney

General on July 28, 1999. On September 1, 1999, the Attorney General's office sent the petitioners a letter informing them that under article 48 of the Massachusetts Constitution, he could not certify their petition. A copy of the letter is attached as Exhibit A.

Counsel for Plaintiffs and Defendants have conferred and have agreed upon terms for an order requiring the Attorney General to release a summary of Initiative Petition No. 99-2 and for the Secretary of the Commonwealth to prepare and release to the Plaintiffs blank petition forms. This proposed order is attached at Exhibit B.

CONCLUSION

For the foregoing reasons this motion should be granted and a preliminary injunction should be entered.

Respectfully submitted,

THE PLAINTIFFS,

September 1, 1999

By their attorneys,

/s/ Eric W. Treene
Kevin J. Hasson
Eric W. Treene (admitted *pro hac vice*)
THE BECKET FUND FOR RELIGIOUS LIBERTY
2000 Pennsylvania Avenue, N.W.
Suite 3580
Washington, D.C. 20006
(202) 955-0095

Michael J. Meagher, BBO
No. 340944
Robert J. O'Regan, BBO No.
379970
BURNS & LEVINSON LLP
125 Summer Street
Boston, Massachusetts
02110-1624
(617) 345-3000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-10377-GAO

MAYA BOYETTE and MONIQUE BOYETTE, by and through their parent and guardian PATRICIA BOYETTE; PATRICIA BOYETTE, in her own capacity; MICHAEL WIRZBURGER, by and through his parent and guardian SUSAN WIRZBURGER; SUSAN WIRZBURGER, in her own capacity; ELIZABETH ZUBRICKI, by and through her parent and guardian RITA ZUBRICKI; RITA ZUBRICKI, in her own capacity,

Plaintiffs

v.

WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts; ARGEO PAUL CELLUCCI, in his official capacity as Governor of the Commonwealth of Massachusetts; FRANK W. HAYDU III, in his official capacity as Interim Commissioner of the Massachusetts Department of Education, JOSEPH D. MALONE, in his official capacity as Treasurer and Receiver General of the Commonwealth of Massachusetts; L. SCOTT HARSHBARGER, in his official capacity as Attorney General of Massachusetts; and JOHN R. SILBER, in his official capacity as Chairman of the Massachusetts Board of Education,

Defendants

MEMORANDUM AND ORDER
September 2, 1998

O'TOOLE, D.J.

Upon the plaintiffs' motion for preliminary injunctive relief, with the consent of all parties, it is ordered, pending a final decision in this case, that the Attorney General release a summary of Initiative Petition No. 98-1 to the Secretary of the Commonwealth and that the Secretary prepare and release to the plaintiffs blank petition forms and take all other steps he would have been required to take under Amendment Article 48 had the petition been certified.

/d/September 2, 1998
DATE

/s/George A. O'Toole, Jr.
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 04-1625

MICHAEL Wirzburger, by and through his parent and guardian Susan Wirzburger; SUSAN WIRZBURGER, in her own capacity; ELIZABETH ZUBRICKI, by and through her parent and guardian Rita Zubricki; RITA ZUBRICKI, in her own capacity,

Plaintiffs - Appellants,

MAYA BOYETTE, by and through her parent and guardian Patricia Boyette; MONIQUE BOYETTE, by and through her parent and guardian Patricia Boyette; PATRICIA BOYETTE, in her own capacity,

Plaintiffs,

v.

WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts; MITT ROMNEY, in his official capacity as Governor of Massachusetts; DAVID P. DRISCOLL, in his official capacity as Interim Commissioner of the Massachusetts Department of Education, TIMOTHY P. CAHILL, in his official capacity as Treasurer and Receiver General of the Commonwealth of Massachusetts; THOMAS F. REILLY, in his official capacity as Attorney General of Massachusetts; JAMES A. PEYSER, in his official capacity as Chairman of the Massachusetts Board of Education,

Defendants – Appellees.

Before

Torruella, Circuit Judge,
Campbell, Senior Judge,
Lipez, Circuit Judge.

ORDER OF THE COURT

Entered: **July 21, 2005**

Appellants' Petition for Rehearing is denied.

By the Court:
Richard Cushing Donovan,
Clerk

By: /s/ JULIE GREGG
Operation Manager

[cc: Mr. O'Reagan, Mr. Meagher, Mr. Gaubatz, Mr. Picarello, Mr. Storzer, Mr. Gilman, Mr. Yogman, Mr. Reilly, Mr. Sacks, Mr. Porter, Mr. Eigerman, Mr. Engel, Ms. Burdette Shields, Mr. Griffin, Mr. Michelson, Ms. Christofolette Quinn, & Mr. Valvo.]

Constitution of the Commonwealth of Massachusetts, Articles of Amendment, Article XVIII

SECTION 1. No law shall be passed prohibiting the free exercise of religion.

SECTION 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

SECTION 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for

themselves.

SECTION 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

SECTION 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people.

Constitution of the Commonwealth of Massachusetts,
Articles of Amendment, Article XLVIII, Part II, Section 2

No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and

referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

APPEAL NO. 04-1625

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL WIRZBURGER, *et. al.*,
Plaintiffs-Appellants

v.

WILLIAM F. GALVIN, *et. al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, CIVIL ACTION NO. 98-CV-10377
(HONORABLE GEORGE A. O'TOOLE, U.S.D.J.)

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING

MICHAEL J. MEAGHER, ESQ.
ROBERT J. O'REGAN, ESQ.
CORNELIUS CHAPMAN, ESQ.
BURNS & LEVINSON, LLP
125 SUMMER STREET
BOSTON, MA 02110-1624
(617) 345-3000

DEREK GAUBATZ, ESQ.*
ANTHONY R. PICARELLO, JR., ESQ.
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 CONNECTICUT AVENUE, N.W.
SUITE 605
WASHINGTON, D.C. 20036
(202) 955-0095

Attorneys for Plaintiffs-Appellants

**Counsel of Record*

ARGUMENT

A petition for rehearing should be granted when the panel has "overlooked or misapprehended" a fact or point of law. FED R. APP. P. 40(a)(2); *Missouri* v. *Jenkins,* 495 U.S. 33, 47 n.14 (1990) ("A petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked.").

Rehearing should be granted in this case because the panel overlooked evidence that would have at least precluded summary judgment against Plaintiffs on their Free Exercise and Equal Protection Clause claims. Specifically, in rejecting both of these claims, the Court relied on the assertion that Plaintiffs presented "no evidence that animus against religion was a motivating factor behind the [Religious] Exclusion's passage." *Wirzburger* v. *Galvin*, No. 04-1625, 2005 WL 1491476, at *8 (1st Cir. June 24, 2005) (rejecting Free Exercise claim); *see id.* at *11 (rejecting Equal Protection claim on similar rationale).

Plaintiffs' briefs, however, presented substantial evidence of the discriminatory intent animating the 1917-18 changes to Article 48, including the Exclusions, but the panel apparently overlooked it. This evidence is contained in the Appendix and referenced on pages 7-10, 14-15, 43-44, and 57-59 of their initial brief, and again on page 14, 24, and 27 of their reply brief. Indeed, summary judgment should have been entered *for* Plaintiffs based on the *unrefuted* declaration of an expert historian that the Anti-Aid Amendment's 1917-18 revisions (like the admittedly bigoted 1854-55 version) were motivated by prejudice against religion. *See* Appx. 591.

Instead, without citation to the record, the Court drew on facts that ad to support a contrary inference and, in effect, found inference as a fact. 2005 WL 1491476, at *8, *12 (emphasizing Catholic votes for 1917-18 revisions). But at a minimum, on the motion for summary judgment against Plaintiffs, they are entitled to the inference that the Catholics who voted for the Exclusions and revised Amendment (just days apart) did so only to avoid the threat of a more virulent anti-Catholic amendment. *See* Plaintiffs' Brief at 10, 57-58. *See also United States* v. *Diebold, Inc.* 369 U.S. 654, 655 (1962) (the evidence on a summary judgment motion must be "viewed in the light most favorable to the party opposing the motion."). Therefore, by its oversight of this evidence, the Court mistakenly affirmed summary judgment for the Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' petition for a panel rehearing should be granted.

Respectfully submitted,
THE BECKET FUND FOR
RELIGIOUS LIBERTY

/s/ Derek L. Gaubatz
DEREK L. GAUBATZ*
ANTHONY R. PICARELLO, JR.
1350 Connecticut Avenue, N.W.
Suite 605
Washington D.C. 20036
(202) 955-0095

BURNS & LEVINSON LLP

MICHAEL J. MEAGHER
ROBERT J. O'REGAN
CORNELIUS CHAPMAN
125 Summer Street
Boston, MA 02110-1624
(617) 345-3000

Attorneys for Plaintiffs-Appellants
**Counsel of Record*

July 8, 2005

CERTIFICATE OF SERVICE

I, DEREK L. GAUBATZ, attorney for Plaintiffs-Appellants, hereby certify that I am duly authorized to make this certification—that on the 8th day of July, 2005, I did cause two (2) true and correct copies of the Appellants' Petition for Panel Rehearing to be delivered by first class mail, postage prepaid, to the following:

William Porter, Esq.
Peter Sacks, Esq.
Assistant Attorney General
One Ashburton Place,
Room 2019
Boston, MA 02108-1698

/s/ Derek L. Gaubatz
Derek L. Gaubatz
Attorney for
Plaintiffs-Appellants

Date: July 8, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAYA BOYETTE, et al., *Plaintiffs*,	)	
v.	)	Civil Action No. 98-CV- 10377-GAO
WILLIAM F. GALVIN, et al., *Defendants*	)	

DECLARATION OF DEREK L. GAUBATZ

I, Derek L. Gaubatz, hereby testify as follows:

1. I represent the Plaintiffs in the above-captioned matter and am admitted pro hac vice before this court in connection with this case. I have personal knowledge of everything testified to in this declaration.

2. Attached hereto as Exhibit "A" is a true and correct copy of Table I, which is a list of private organizations, charitable and otherwise, that received grants from various agencies of the Defendant Commonwealth of Massachusetts in Fiscal Year ("FY") 2000 and FY 2001. The Table lists the name of each organization, along with the corresponding line-item from the FY 2000 and FY 2001 Massachusetts Appropriations Bills that show the Commonwealth's grant of public funds to that organization. The data supporting this table – more detailed information about each grantee organization, as well as actual copies of

the budget reflecting expenditure of public funds – is provided in Exhibits "B," "C," and "D" described below.

3. Attached hereto as Exhibits "B" and "C" are true and correct copies of excerpted pages from the Fiscal Year 2000 and Fiscal Year 2001, respectively, Massachusetts Appropriations Bills, portions of public laws provided here for the convenience of the court. These excerpts correspond to the "Budget Line Items" listed in Table I, contained in Exhibit "A" described above. I obtained these pages by searching personally through state legislative records for fiscal years 1998 through 2000 at the State House Library in Boston. In addition, I searched through the same appropriations information for FY 2001 and FY 2002 on Defendant's website. Although the budgets for all five of these fiscal years reflected similar kinds of grants to similar kinds of private organizations, I have presented more detailed evidence only regarding the typical years of FY 2000 and FY 2001, as a practical limitation. I am willing to provide similarly detailed information to the court, if the court finds it necessary or desirable for purposes of resolving the present motion.

4. Attached hereto as Exhibit "D" is a true and correct copy of web pages that provide additional documentation of the private and/or charitable character of some of the organizations listed in Table I that received grants from Defendant Commonwealth of Massachusetts in FY 2000 and FY 2001.

5. Attached hereto as Exhibit "E" is a true and correct copy of excerpted pages from the "Status Report on the Massachusetts Preservation Projects Fund, 1995-2000," comprising a list of Massachusetts preservation projects funded between 1995 and 2000. I obtained this document directly from the Massachusetts Historical Commission in response to a request for that information I made by phone in January 2002.

6. Attached hereto as Exhibit "F" is a true and correct copy of a document that I generated by electronically copying and pasting information that I found at http://www.massculturalcouncil.org, the website of the Massachusetts Cultural Council, an agency of Defendant Commonwealth of Massachusetts. I visited the website in January 2002, and the information is no longer available on the website. The document identifies some of the Fiscal Year 2001 grantees of the Massachusetts Cultural Council, including the name of each grantee organization; the city where each grantee is located; and the amount each grantee received.

7. Attached hereto as Exhibit "G" is a true and correct copy of a list of organizations awarded grants by the Massachusetts Department of Public Health, an agency of Defendant Commonwealth of Massachusetts, for work dealing with "immigrant & refugee domestic violence and sexual assault prevention and intervention." This list was obtained from the Department of Public Health's website at the address http://www.state.ma.us/dph/bfch/vpis/ir.pdf. Also contained in this Exhibit is information about one of the non-profit grantees, Centro Latino de Chelsea, obtained from its website. I generated and printed the documents in Exhibit "G" on November 6, 2002.

8. Attached hereto as Exhibit "H" is a true and correct copy of a web page identifying a list of Rape Crisis Centers that have been funded by the Massachusetts Department of Public Health, an agency of Defendant Commonwealth of Massachusetts. The web page was found on the Department of Public Health's website at http://www.state.ma.us/dph/sapss/sites.htm. Also contained in this Exhibit is information about two of those non-profit Rape Crisis Centers, the Elizabeth Freeman Center and Independence house, obtained from their respective websites. I generated and printed the documents in Exhibit "H" on November 6, 2002.

9. Attached hereto as Exhibit "I" is a true and correct copy of a letter sent to me by the Assistant Attorney General of the Defendant Commonwealth of Massachusetts, responding to a discovery request concerning whether any non-school, non-public entities have been denied funding by an agency of Massachusetts in order to comply with Massachusetts' "Anti-Aid" Amendment.

10. Attached hereto as Exhibit "J" is a true and correct copy of a document that I generated from the website of the Massachusetts Department of Education, which is an agency of Defendant Commonwealth of Massachusetts, by visiting http://profiles.doe.mass.edu/privateschools.asp, which contains a list of private schools located in Massachusetts. I generated and printed this document in this manner on November 5, 2002.

11. Attached hereto as Exhibit "K" are true and correct copies of lists of Catholic schools located in Massachusetts' four dioceses. The first list is composed of schools located in the Archdiocese of Boston, the second in the Diocese of Springfield, the third in the Diocese of Fall River, and the fourth in the Diocese of Worcester. I obtained these lists from the Parents Alliance for Catholic Education.

12. Attached hereto as Exhibit "L" is a true and correct copy of "Statewide Ballot Measures: 1919 Through 2000," obtained from the Defendants in the course of discovery.

13. Attached hereto as Exhibit "M" are true and correct copies of letters in 1991 from the Attorney General concerning his certification decisions on certain initiative petitions. Also included in this exhibit are true and correct copies of summaries of the referenced initiative petitions. All materials in this exhibit were obtained from the Defendants in the course of discovery in this case.

14. Attached hereto as Exhibit "N" is a true and correct copy of the Attorney General's certification decisions on initiative petitions, dated September 1, 1993 and August 4,

1993. Each was obtained from the Defendant in the course of discovery in this case.

15. Attached hereto as Exhibit "O" are true and correct copies of news releases issued by the Office of the Attorney General between 1995 and 2001 announcing the certification of initiative petitions. These documents were obtained from the Defendant in the course of discovery in this case.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 6, 2002.

/s/ Derek L. Gaubatz
DEREK L. GAUBATZ

EXHIBIT A

Table I – Examples of Massachusetts Grants to Private and / or Charitable Entities, FY 2000 and FY 2001

For each entity, Plaintiffs have provided information to support the fact that the entity received funding from the Commonwealth. In addition, although it is self evident for most of these organizations, information is also provided to show that the entity is a non-profit-charitable organization that is not publicly owned.

Organization Name	**Budget Line Item**
Veterans Northeast Outreach Center	FY 2000--1410-0012
North Shore Veterans Counseling Center in City of Haverhill	FY 2000--1410-0012
Veterans Benefit Clearinghouse, Inc.	FY 2000--1410-0012
Veterans Association of Bristol County	FY 2000--1410-0012
NamVets Association of the Cape and Islands	FY 2000--1410-0012
Outreach Center Inc. in the city of Pittsfield	FY 2000--1410-0012
Montachusetts Veterans Outreach Center	FY 2000--1410-0012
Metrowest/ Metrosouth Outreach Center in the town of Framingham	FY 2000--1410-0012
Puerto Rican Veterans Association of Massachusetts, Inc. in the city of Springfield	FY 2000--1410-0012
New England Shelter for Homeless Veterans in the City of Boston (a/k/a Vietnam Veterans Workshop)	FY 2000—1410-0251
Massachusetts Veterans' Shelter in the City of Worcester	FY 2000—1410-0250
Southeastern Massachusetts	FY 2000—1410-

Veterans Housing Program, Inc. in the City of New Bedford	0250
Veterans Hospice Homestead (Leominster/Fitchburg)	FY 2000—1410-0250
Habitat P.L.U.S., Inc. in the City of Lynn	FY 2000—1410-0250
Turner House Center for Veterans, Inc. in the City of Williamstown	FY 2000—1410-0250
YMCA	FY 2000 (4000-0110); FY 2000 (4406-3000); FY 2001 (4000-0112)
YWCA	FY 2000 (4000-0110); FY 2000 (4406-3000); FY 2000 (4800-1400); FY 2001 (4000-0112)
Russian Teens at Risk Program operated by Jewish Family and Children's Service	FY 2000 (4000-0110); FY 2001 (4000-0112)
Billerica Boys and Girls Club	FY 2000 (4000-0110)
Massachusetts Families for Kids	FY 2000 (4000-0115)
Action for Boston Community Development (ABCD)	FY 2000 (4000-4130)
Emmaus Inc.	FY 2000 (4403-2120)
Our Father's House	FY 2000 (4406-3000)
Massachusetts Housing and Shelter Alliance	FY 2000 (4406-3000)
Boston Rescue Mission	FY 2000 (4406-3000)

Pine Street Inn Boston	FY 2000 (4406-3000)
St. Francis House Boston	FY 2000 (4406-3000)
Cambridge Salvation Army	FY 2000 (4406-3000)
Quincy Interfaith Sheltering Coalition	FY 2000 (4406-3000)
American Red Cross (Berkshire County)	FY 2000 (4406-3000)
Somerville Homeless Coalition	FY 2000 (4406-3000)
Hyannis Salvation Army	FY 2000 (4406-3000)
St. Francis Samaritan House in Taunton	FY 2000 (4406-3000)
Mainspring House in Brockton	FY 2000 (4406-3000)
Open Pantry Community Services Inc.	FY 2000 (4406-3000)
Shelter Inc	FY 2000 (4406-3000)
Celeste House	FY 2000 (4512-0200)
CASPAR emergency service center in Cambridge	FY 2000 (4512-0200)
Latinas y Ninos	FY 2000 (4513-1000); FY 2000 (4800-0018)
Big Brothers and Sisters of Cape Cod and the Islands	FY 2000 (4800-0018)
On the Rise	FY 2000 (4800-1400)
New England Center for Women in Transition	FY 2000 (4800-1400)

Lighthouse Clubhouse Program	FY 2000 (5046-0000)
Just A Start Corporation (includes Futures for Young Parents)	FY 2000 (7003-0801); FY 2000 (7004-3036)
Massachusetts Council for Quality a/k/a MassExcellence	FY 2000 (7007-0400)
Center for Women and Enterprise	FY 2000 (7007-0400)
Freedom Trail Foundation	FY 2000 (7007-0950)
Massachusetts Sports Partnership Inc.	FY 2000 (7007-0950)
Whaling Museum in New Bedford	FY 2000 (7007-0950)
Best Buddies Massachusetts	FY 2001 (5920-2000)
Friendly House Center of Worcester	FY 2001 (7007-0400)
Dismas House in Worcester	FY 2001 (8900-0015)
Salem Boys and Girls Club	FY 2001 (4000-0112)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAYA BOYETTE, et al., *Plaintiffs*,	)	
v.	)	Civil Action No. 98-CV- 10377-GAO
WILLIAM F. GALVIN, et al., *Defendants*	)	

DECLARATION OF CHARLES L. GLENN

I, Charles L. Glenn, state on penalty of perjury the following:

1.. I am Professor of Education and Chairman of the Department of Administration, Training and Policy Studies at Boston University's School of Education I was appointed to the faculty effective September 1991. Among the graduate courses that I teach are *Educational Policy*, *Educational Freedom*, *Diversity and Justice in Education*, and *History of Education*.

2.. My immediately previous position was as Executive Director, Office of Educational Equity, Massachusetts Department of Education. I held that position and a substantially similar position, Director of the Bureau of Equal Educational Opportunity, from February 1971 to September 1991. I was the first and only occupant of both positions. From August 1970 to February 1971 I was Model Cities Coordinator in the same agency. My

responsibilities in all three positions were similar: reporting directly to the Massachusetts Commissioner of Education, to coordinate and direct civil rights and urban education efforts, to enforce state and federal laws protecting educational rights in schools, and to administer state and federal funds appropriated for those purposes.

3.. I received my first doctorate (Ed.D.) in educational administration and policy from Harvard University in 1973, working primarily with the sociologist Nathan Glazer, and my second doctorate (Ph.D.) in religion and modern culture from Boston University in 1987, working primarily with sociologist Peter Berger. The topic of my research for the first doctorate was strategies to achieve the constitutionally-required equal education for minority students in Massachusetts. The topic of my research for the second was the history of conflict between state education and the desire of groups of parents to determine for themselves the religious or philosophical basis of the schooling their children would receive. This was published at *The Myth of the Common School* (University of Massachusetts Press 1988), a book that has been cited in law review articles and court rulings as an authority on the history of these perennial conflicts.

4.. My subsequent books have explored each of these issues further. They are

Choice of Schools in Six Nations, Washington, D.C.: U.S. Department of Education, 1989.

Educational Freedom in Eastern Europe, Washington, D.C.: U.S. Department of Education, 1994.

Educational Freedom in Eastern Europe, 2nd edition, Washington, D.C.: Cato Institute, 1995.

Educating Immigrant Children: Schools and Language Minorities in 12 Nations, (with Ester J. de Jong), New York: Garland Publishing, 1996.

The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies, Princeton University Press, 2000.

I have also published several dozen monographs on these themes, chapters in more than fifty book-length collections, and a great many articles. For more than a dozen years I have lectured on these issues several times a year in Europe as well as across the United States. I have served as a consultant on educational equity to Ohio, Illinois, New York State, Michigan, Minnesota, Pennsylvania, and other states, and to Chicago, Mobile, Tel Aviv, San Diego, Albuquerque, and other cities, to the United States Departments of Justice and Education, and as an expert witness in cases in Ohio, Delaware, Alabama, Pennsylvania, California, and Massachusetts.

5.. My research has taken three forms: historical, sociological, and organizational. I will describe briefly the basis of each and how it is relevant to the present controversy.

6.. The relevant portion of my historical research has included reading thousands of pages of documents from the period of the 1830s through the 1850s when the 'common school' was vigorously debated and the model of state oversight of schooling developed in Massachusetts. In addition, I have read extensively in the relevant documents of the last decades of the nineteenth century and the first decades of the twentieth, when majority opinion was strongly mobilized against any accommodations of the desires of Catholic parents—especially immigrants—to determine the religious content of the schooling provided to their children. I gave careful attention to the two volumes of published *Debates in the Massachusetts Constitutional Convention, 1917-1918* (Boston 1919), and the report of the Massachusetts Commission on Immigration, *The Problem of Immigration in Massachusetts* (Boston: Massachusetts House of Representatives, 1914). In

addition to these sources, which are reflected in my books, I was granted a sabbatical for all of 1998 to conduct further research into these issues, concentrating on the first half of the twentieth century; I presented some early conclusions at the Woodrow Wilson Center in February 2000, and this will be published in a special issue of the *Journal of Policy History* and a subsequent book.

7.. These further studies have strengthened the conclusions that I reached in *The Myth of the Common School* (1988), that the financial monopoly position of government-operated schools in the United States, in contrast with other Western democracies (discussed below) is primarily the result of fear of and hostility, in elite circles, toward Catholic immigrants and—in recent decades—toward evangelical Protestants. One of the delegates to the 1917-1918 Constitutional Convention in Massachusetts, I wrote, noted that "We are legislating in mutual fear and distrust." A supporter of the Anti-Aid Amendment at the Convention "described immigrants as coming 'over here more or less dirty, immoral and thriftless, and in the third generation they were changed to native Americans' through the 'principal cause of the progress of this Nation,' the public school system. Catholic delegates argued eloquently that their own schools were 'educating their children to become good citizens' and that 'the prejudice of this day against parish schools' was unjust and socially divisive." I concluded that "the underlying agenda [of the Constitutional Convention] continued to be the creation of uniformity of belief. No support should be provided to any institution, another delegate said, that is 'teaching, inculcating, or promoting a doctrine that is not common to all the people of the Commonwealth and in which all the people do not believe'" (*The Myth of the Common School*, page 254). As I pointed out in the last chapter of that book, this view (enshrined in the Massachusetts Anti-Aid Amendment) is contrary to that

based on the United States Constitution, that government may not seek to use its power over schools "to foster 'a homogeneous people with American ideals' (*Meyer v. Nebraska*, 1923), 'to standardize its children' (*Pierce v. Society of Sisters*, 1925), or to achieve 'an officially disciplined uniformity' (*West Virginia v. Barnette*, 1943)" (page 282).

8.. My sociological research relevant to the present case has focused upon how immigrant minority groups adapt to host societies, and especially how their children are affected by the schooling provided to them. My book *Educating Immigrant Children: Schools and Language Minorities in 12 Nations*, (with Ester J. de Jong, New York 1996) was based upon interviews and visits to schools in a number of countries, as well as my review of scholarly studies and policy debates conducted in those countries and in nine languages. One of the primary conclusions of this study was that religious institutions, including religious schools, are often important bridges for immigrant families to successful participation in the host society. This was equally true, I pointed out, in nineteenth century America, where "for Dutch, German and Scandinavian Protestant immigrants who organized local churches and associations on a national basis, for the members of autocephalic (national) Orthodox churches which became American denominations, and for Roman Catholics who organized 'national parishes' in many cities, religious life was the primary expression of community and anchor of identity on a national as well as a religious basis" (*Educating Immigrant Children*, page 202). I draw upon examples from a number of countries to show that this continues to be true for Muslim and other immigrant groups and that—significantly for the present case—the refusal of governments to accommodate the desire for schooling based upon and respectful of religious distinctiveness has exacerbated inter-group tensions and made the integration

of these groups into French, German, and other societies more difficult. As I wrote about a controversy that has been straining relations between French society and its large Muslim minority for a dozen years, "Inevitably, schools experience in an acute form the controversies over religious expression and its meaning for the minority and the majority; it was no accident that the affaire des foulards took place in a school. For Islamic militants, French schools are intended to brainwash Muslim pupils . . . The claim to neutrality is perceived as profoundly deceptive, since secularity itself takes a position against faith and undermines its very foundation, its epistemological validity" (page 213).

9.. In other words, the belief held by the supporters of the Massachusetts Anti-Aid Amendment, that the children of immigrants would become 'real Americans' only by being subjected to schooling that took no notice of their religious background and the convictions of their parents, was sociologically incorrect and continues to be unwise as Massachusetts accommodates new groups of immigrants as well as faith-communities such as Orthodox Jews, evangelical Protestants, and Roman Catholics, who seek to mediate their participation in this society, and that of their children, through organizations and institutions based upon religious conviction. There is mounting evidence that the decision of the Netherlands to accommodate the desire of Muslim and Hindu immigrants for their own schools, provided that these schools meet all Dutch educational standards, reduces inter-group tensions and promotes eventual integration.

10.. Finally, my research on policies and organizational structures in education began with my own state government responsibilities over two decades and has continued with studies of the control and regulation of schooling in twenty-five nations. I am a founding member (the only American) of the Antwerp-based European

Association for Education Law and Policy and also of the Geneva-based *Organisation pour le développement de la liberté de l'enseignement* (Organization to promote educational freedom), and participate regularly in their meetings with colleagues from across Europe and beyond. I have served on a commission to advise Russia about educational reform, and have assisted the legislative drafters of the new Chinese education code. Reflecting this research and involvement, I have published a number of monographs and book chapters on this subject, two books (*Choice of Schools in Six Nations and Educational Freedom in Eastern Europe*) commissioned by the United States Department of Education and, most recently, *The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies* (Princeton 2000).

11.. These comparative studies in policy and administration have demonstrated that the attempt to obtain a monopoly on the formation of beliefs and loyalties is a universal characteristic of totalitarian regimes, and state-supported educational pluralism is a characteristic of most democratic regimes . . . with the United States in a distinct minority. I show that school choice by parents is considered a fundamental right. For example, the *Universal Declaration of Human Rights* (1948) states that "parents have a prior right to choose the kind of education that shall be given to their children" (article 26, 3). According to the *International Covenant on Economic, Social and Cultural Rights*, "the States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to choose for their children schools, other than those established by public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions" (article 13,3). Similarly, the First Protocol to the *European Convention for the Protection of*

Human Rights and Fundamental Freedoms provides that "in the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" (article 2). The German, Dutch, Belgian, and other constitutions recognize educational choice as a fundamental right, and the same principle is enshrined in the recently-adopted constitutions of a number of post-communist societies. For example, the new Bulgarian Constitution (1991) stipulates that "the raising and the education of children until they come of legal age is a right and an obligation of their parents; the state provides assistance" (article 47, 1). That of Estonia (1992) provides that "parents shall have the final decision in choosing education for their children" (article 37). Croatia (1990) provides that "parents shall have the duty to bring up, support and school their children, and shall have the right and freedom independently to decide on the upbringing of children" (article 63). Hungary states in its new Constitution (1989) that "parents shall have the right to choose the type of education they wish to ensure for their children" (article 67, 2).

12.. Not only do other democracies guarantee the right of parents to make educational decisions for their children, but almost all provide public funding to ensure that this right can be exercised by moderate-income parents. Such funding is provided (under arrangements that differ in detail) by the various Canadian provinces and the Australian states and national government, by New Zealand, and every country of the European Union except Italy and Greece (which provide religious instruction within the state educational system). It is also provided by most of the ex-communist regimes of Central and Eastern Europe, including Russia.

13.. Not only do these funding arrangements make it possible for parents to exercise a fundamental right, but they also help to sustain a vibrant civil society, as I show in *The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies* (2000). By encouraging parents and teachers to work together to organize and manage schools that possess a distinctive—often religious—mission, public funding of non-government schools helps to build the habits of trust and cooperation that have been so eroded in many inner-city areas.

14.. In summary, the action of the Massachusetts Constitutional Convention in 1917-18 in adopting the 'Anti-Aid Amendment' was clearly motivated by a prejudicial understanding of the place of ethnic and religious minorities in American life and a determination to use a government monopoly of publicly-funded schooling in order to impose a state-endorsed orthodoxy of beliefs and loyalties. Clearly the Convention was responding to the fear of foreigners that would soon lead to drastic restrictions on immigration from Southern and Eastern Europe, and the "Americanization" frenzy that led to banning the study of German in hundreds of high schools. The wise words of the Supreme Court during a later world war could be applied, retrospectively, to this sorry episode in the history of this Commonwealth: "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrines and whose program public educational officials shall compel youth to unite in embracing. . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."

(*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

I declare under penalty of perjury that the forgoing [sic] is true and correct.
Executed this 23rd day of March, 2000

/s/Charles L. Glenn
Charles L. Glenn

3

No. 05-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

MICHAEL WIRZBURGER, ET AL.,
Petitioners,

v.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS F. REILLY
Attorney General
of Massachusetts
WILLIAM W. PORTER*
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
**Counsel of Record*

QUESTIONS PRESENTED

The Massachusetts Constitution provides two means by which its provisions can be amended – a legislative process and a citizen initiative process. Under the legislative process, any legislator may introduce a constitutional amendment on any subject. A citizen initiative may only propose a measure that does not contain any of a variety of "excluded matters" that are enumerated in Mass. Const. Amend. Art. 48, Init., pt. 2, § 2.

The questions presented are:

1. Whether petitioners' rights under the Free Speech Clause of the First Amendment were violated when their proposed initiative was denied certification because it addressed subjects excluded from the initiative process under Mass. Const. Amend. Art. 48, Init., pt. 2, § 2.

2. Whether the Massachusetts constitution violates the Equal Protection Clause by providing for lawmaking by citizen initiative while excluding various subjects from that process deemed better left for legislative lawmaking, including citizen initiatives that would amend the State's prohibition on public aid to private institutions and citizen initiatives that relate "to religion, religious practices or religious institutions."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Miscellaneous

OPINIONS BELOW

The opinion of the First Circuit is reported at 412 F.3d 271. Petition Appendix ("Pet. App.") at 1a. The opinion of the District Court is reported at 311 F. Supp. 2d 237. Pet. App. 25a.

JURISDICTION

The judgment of the First Circuit entered on June 24, 2005. Pet. App. 1a. The First Circuit denied panel rehearing on July 21, 2005. Petitioners invoke this Court's jurisdiction under 28 U.S. C. § 1254(1).

STATEMENT OF THE CASE

In this action the petitioners sought, by an initiative petition, to amend the Massachusetts Constitution, specifically its Anti-Aid Amendment, to permit public funding for students attending private schools, including religious schools. Pet App. 3a. The Massachusetts Attorney General declined, however, to certify their petition because it addressed two matters expressly excluded under the state constitution: initiatives that seek to amend the Anti-Aid amendment and laws that relate "to religion, religious practices or religious institutions." Mass. Const. Amend. Art. 48, Init., pt. 2, § 2, ¶ 1. The petitioners thereafter sought, unsuccessfully, a declaration that these limitations on direct, popular lawmaking violate their rights under the Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 2a.

The Article 48 Amendment Process

Article 48 of the Massachusetts Constitution established two alternative mechanisms for amending the Massachusetts Constitution – an initiative petition process and a legislative process. Under the legislative amendment process, any legislator may introduce a constitutional amendment on any subject. Mass. Const. Amend. Art. 48, Init., pt. 4, § 1. An initiative petition for a constitutional amendment may properly be "introduced into the [Legislature]," *id.* § 1, if, *inter alia*, it has been signed by the required number of qualified voters and has the Attorney General's certification that the petition contains no excluded matters. Article 48, Init., pt. 2, §§ 3, 4.

The excluded-matters provisions of Article 48 are a structural check on the initiative petition process. Article 48 provides that an initiative petition cannot propose any measure that relates:

> to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth . . . .

Art. 48, Init., pt. 2, § 2, ¶ 1. In addition, the Anti-Aid Amendment, as approved following the Massachusetts Constitutional Convention of 1917, may not be the subject of an initiative amendment. *Id.*, ¶ 2. Also declared off-limits are any

measures inconsistent with ten individual rights protected by the Massachusetts Declaration of Rights. *Id.* ¶ 3. Finally, the Article 48 exclusions are themselves excluded from the initiative process. *Id.*, ¶ 4.

The Petitioners' Initiative Petition

On July 28, 1999, petitioner Susan Wirzburger ("Wirzburger"), along with fourteen others, submitted a citizen initiative petition ("Initiative Petition 99-2") to the Attorney General that would modify Massachusetts' Anti-Aid Amendment by adding a sentence to permit the Commonwealth and its political subdivisions to make "loans or grants, or provid[e] tax benefits, to students or parents or guardians of students attending private primary, secondary or higher education institution[s], regardless of any religious affiliation or character of such institutions." C.A. App. 500-501, 520.[1] By letter dated September 1, 1999, the Attorney General informed the signers of the petition that he was "unable to certify that the proposed constitutional amendment 'contains only subjects . . . which are not excluded from the popular initiative,' as would be required for the petition to proceed in the Article 48 process. Art. 48, Init., pt. 2, § 3." The Attorney General's letter explained that "the petition seeks to amend the state's "Anti-Aid Amendment," Mass. Const. amend. art. 18, which Article 48 expressly forbids, and the petition also explicitly relates to "religious institutions," another matter expressly excluded from

---

[1] The petitioners are not members of a discrete religious group. Of the three petitioners' families, the Boyettes are Pentecostal; the Wirzburgers are Roman Catholic; and the Zubrickis state that they believe in the importance of Catholic teachings but do not claim to be Catholic. C.A. App. 28-30. Their children attend, or wish to attend, parochial schools, for either educational or religious reasons. Pet. App. 38a.

the initiative process by Article 48. C.A. App. 522. The proponents of the petition were later permitted (under an agreement reached in this case) to gather signatures for Initiative Petition No. 99-2, and obtained more than the required number. Ultimately, however, because the petition had not been certified, the joint session of the Legislature that convened in May 2000 declined to act on it. C.A. App. 500-502.

The Anti-Aid Amendment

The petitioners' proposed initiative measure would have amended the 18th Amendment to the Massachusetts Constitution – commonly called the Anti-Aid Amendment. C.A. App. 522. That provision states, in part, that:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both . . . . and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Mass. Const. Amend. art. 18, as amended by arts. 46 and 103. The Anti-aid Amendment also contains an explicit guarantee of

the free exercise of religion. Amend. art. 18, § 1 ("No law shall be passed prohibiting the free exercise of religion.").

The present day version of the Anti-Aid Amendment – barring use of public money "for the purpose of founding, maintaining or aiding" private institutions generally – was enacted in 1917 (as Amend. art. 46) and replaced the original Eighteenth Article of Amendment enacted in 1855. *See* M.G.L.A. Const. Amend. Art. 18, Historical Notes (West 1997).[2] The original Article 18 barred only public funding of religious schools, providing that "such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." *Id.*[3]

The proposal to broaden the original Anti-Aid Amendment to preclude aid to *any* institution (whether religious or not) that was not under public control was made to the 1917-1918 Constitutional Convention by Martin Lomasney of

---

[2] The Anti-Aid Amendment was approved by the voters on November 6, 1917, by a margin of 61% to 39%. 1 *Debates in the Massachusetts Constitutional Convention, 1917-1918* at 230 (1919) (hereafter *Debates*).

[3] In 1974 amendment article 103 was adopted, altering section 2 of the Anti-Aid Amendment (Amend. art. 46, § 2) to permit the Commonwealth to make grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions. The 1974 amendment also eliminated from section 2 of the Anti-Aid Amendment the 1917 language prohibiting public aid to schools and other institutions "whether under public control or otherwise, wherein any denominational doctrine is inculcated," leaving in place the wholly neutral prohibition enacted in 1917 on aid to schools and private institutions that are not "publicly owned and under the exclusive control, order and supervision of public officers or public agents . . . ."

Boston, a prominent Catholic politician. C.A. App. 638-41. This position represented a compromise intended to place on equal footing both parochial schools (which were already ineligible for state funds) and the private "academies" often attended by Protestants (which had been receiving public funds). C.A. App. 638. One prominent historian has noted that this compromise was supported by "[a] wide majority of the [constitutional] convention, including all but nine of the ninety-four Catholic delegates." C.A. App. 641. *See* 1 *Debates* at 199 (remarks of Mr. Coleman, noting that Anti-Aid Amendment was supported by Mr. Curtis, "a rock-ribbed Republican . . . of the Protestant faith" and by Mr. Lomasney, "a red-hot Democrat" and "a devout Catholic"; "yet they are joining heart and hand in their advocacy of this measure, upon which one might suppose they never would be able to agree").

Lower Court Proceedings

District Court. This action was filed on March 3, 1998, challenging both the Anti-Aid Amendment (art. 46, § 2) and the religious-institutions and Anti-Aid exclusions in Article 48. C.A. App. 8, 27-45. On September 2, 1998, the district court ordered, with the consent of all parties, that, pending a final decision in the case, the Secretary of the Commonwealth release blank petition forms to permit the petitioners to collect signatures in support of their proposed initiative (despite the Attorney General's earlier refusal to certify it). C.A. App. 50. After they collected the requisite number of signatures, petitioners moved for a preliminary injunction on April 6, 2000, to require the Attorney General to certify their petition, despite its non-compliance with Article 48. C.A. App. 15. On May 5, 2000, the district court denied petitioners' motion for preliminary injunction. C.A. App. 17. On February 12, 2001, the court granted the respondents' motion to dismiss, for lack of standing, the petitioners' challenge to the Anti-Aid

Amendment. C.A. App. 18, 51-60.[4] On March 31, 2004, the court, ruling on cross-motions for summary judgment, entered judgment in favor of the respondents on petitioners' claims that the Anti-aid exclusion and the religious institutions exclusion violate the Free Speech, Free Exercise and Equal Protection Clauses. Pet. App. 25a–36a.

Rejecting the Free Speech claim, the court recognized that the "effect of the . . . initiative exclusions . . . is to preclude direct popular lawmaking as to certain subject areas[,]" but not to "[restrict] speech either in favor or against any initiative petition that is permitted." Pet. App. 28a. The court observed that, under the Massachusetts constitution, "the initiative procedure . . . is an exception to the general rule that lawmaking will be accomplished by the legislature[,]" and "found no reason to think that the federal Constitution requires . . . [that Massachusetts] permit the initiative to be used for all lawmaking purposes without restriction . . . ." Pet App. 30a (finding that "topical grants or prohibitions of lawmaking powers are usual and traditional"). As to petitioners' Equal Protection claim, the court held that neither the Anti-Aid or religious exclusions "classify" petitioners "by reference to their religious beliefs or practices," Pet. App. 32a, finding instead that petitioners' "group identity," if they have one, is most defined by reference to their shared interest in the educational

---

[4] On appeal, petitioners did not challenge the dismissal of their challenge to the Anti-Aid Amendment. Pet App. 2a, n.2. Consequently, substantial sections of the petition to this Court, which purport to show that the Anti-Aid Amendment has been "selectively enforced" to permit public funding of various types of private (religious and non-religious) institutions, but not of private (religious and non-religious) schools, are both immaterial and, in any event, show no cognizable form of impermissible discrimination. See Pet. 6-10, 27-30.

opportunities offered by religious-sponsored schools. *Id.* The court also found that because the exclusions pertain only to the initiative ballot, they do not burden petitioners' "fundamental right to practice their chosen religion." Pet. App. 33a. Accordingly, the court applied rational basis review and found rational the judgment reached at the Massachusetts Constitutional Convention of 1918 that some questions are better resolved in a legislative process, which "permits extended debate and compromise," than in the initiative process, which "essentially puts a fixed proposition to the general electorate for a single up or down vote." Pet. App. 35a. Finally, the court rejected the petitioners' claim that the religious exclusion violates the Free Exercise Clause because "the exclusion bears on the plaintiffs' ability to invoke the initiative process, not on the exercise of religion." Pet. App. 35a, citing *Locke v Davey*, 540 U.S. 712 (2004).

Court of Appeals The First Circuit affirmed. With respect to petitioners' Free Speech claim, the court observed that the Anti-Aid and religious institutions exclusions operate within a "procedure for generating law" and "aim at preventing some harm independent of speech – in this case, the use of the initiative process for the passage of certain types of laws believed to be unsuited to that process . . . ." Pet. App. 4a. As such, the court held that the exclusions are "at most, subject to intermediate scrutiny," Pet. App. 5a, because their effect on speech (*i.e.* precluding use of the initiative process to "spur[] public debate" on certain issues) is purely incidental. Pet. App. 7a-9a. The court then concluded that the exclusions meet the intermediate scrutiny standard in *United States v O'Brien*, 391 U.S. 367, 377 (1968). In particular, the court held that Massachusetts has a substantial interest in "restricting the means" for enacting laws affecting "the balance between promoting free exercise and preventing state establishment of religion." Pet. 12a. The court also held that this interest is

"unrelated to the suppression of free expression," *id.*, where the "exclusions regulate which types of laws or amendments can be passed by initiative, without reference to who may speak or what message they may convey." Pet. 11a.

The First Circuit also held that petitioners failed to establish that the religious exclusion violates their rights under the Free Exercise Clause. Pet. App. 13a.[5] The court found that the exclusion does not "discriminate on the basis of religious belief or status" because it "applies equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof." Pet. App. 15a. The Court also concluded that the exclusion does not burden any religious act or practice, where petitioners cannot claim that seeking a state constitutional amendment "is an aspect of practicing their religion." Pet. App. 16a. Finally, the court rejected, as unfounded, petitioners' claim that the religious exclusion "was motivated by animus toward religion[,]" Pet. App. 16a,[6] and explained that such evidence was, in any event, immaterial because petitioners had not shown a "resulting infringement" on religious belief, status, acts or conduct. Pet. App. 17a.

---

[5] Petitioners did not challenge the Anti-aid exclusion under the Free Exercise Clause. Pet. App. 13a., n. 3.

[6] The court noted that petitioners submitted evidence of animus toward Catholics in Massachusetts in 1855 (when an earlier version of the Anti-Aid Amendment was passed), but "fail[ed] to show that religious animus motivated passage of the Religious Exclusion in 1918[,] * * * given the wide margin by which [the exclusion] passed, and the significant Catholic representation at the [Constitutional Convention of 1917-1918]." Pet. App. 16a – 17a.

The First Circuit also rejected petitioner's Equal Protection claims against both exclusions, finding that neither employs a suspect classification: "On their face, the Exclusions simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs. They do not give preference to any religion." Pet. App. 20a. The court distinguished the exclusions from those laws struck down in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969), which "evince[d] a clear, solely detrimental effect on a suspect class." Pet. 21a. The court found that it need not consider the petitioners' argument that the Anti-Aid exclusion has a disparate impact on religious individuals where petitioners had "not shown a discriminatory purpose" behind enactment of the exclusion in 1917. Pet. App. 22a-23a. Accordingly, the court reviewed the exclusions under a rational basis test, which the court found was satisfied because the State's "goal of preventing the establishment of religion is a legitimate one." Pet. App. 24a.

REASONS FOR DENYING THE WRIT

I. The Petitioners' Free Speech Claim Does Not Merit Review.

A. The Lower Courts Have Consistently Held That The Government Does Not Violate The Free Speech Clause When It Limits The Subjects That Can Be Addressed In Legislation Proposed By Citizen Initiative.

Because the petition fails to satisfy any of the traditional criteria for a grant of certiorari, review should be denied. With respect to their Free Speech claim, petitioners incorrectly assert that review is needed to resolve a "split" among the courts of appeal "over the level of scrutiny" applicable to subject matter restrictions in the initiative process. Pet. 13, 16-19. To the contrary, all three federal courts of appeal (and at least one state supreme court) that have addressed the issue have held that the government may limit the subjects that can be addressed in citizen initiatives without violating the First Amendment. Petitioners are wrong to suggest that review is warranted simply because these decisions emerged from somewhat different analyses, especially where all three circuits agree that the decisions of this Court upon which petitioners rely, *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), are not controlling.

1. There is no conflict among the lower courts with respect to the Free Speech issue in this case. As the First Circuit observed, petitioners "do not cite to any precedent for the proposition that, under the Free Speech Clause of the First Amendment, a state may not restrict the subjects that can be addressed through its initiative process." Pet. App. 9a-10a.

Two other federal courts of appeal, the D.C. and Tenth Circuits, have directly addressed the Free Speech issue in this case and both, like the First Circuit, rejected the constitutional claim. In *Marijuana Policy Project ("MPP") v. United States*, 304 F.3d 82 (D.C. Cir. 2002), the D.C. Board of Elections refused to certify a ballot initiative to allow the medical use of marijuana, citing the Barr Amendment, by which Congress denied the District of Columbia authority to "enact . . . any law" reducing penalties associated with possession, use or distribution of marijuana. *Id.* at 83-84.[7] The D.C. Circuit held that this restriction did not violate MPP's rights under the Free Speech Clause, holding that "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* at 85.[8] The court rejected the argument that the Barr Amendment proscribed "core political speech," explaining that "medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties." *Id.*

Similarly, in *Skrzypczak v. Kauger*, 92 F.3d 1050 (10th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997), the Tenth Circuit held that pre-submission review of the content of an initiative petition by the Oklahoma Supreme Court did not

---

[7] With respect to the District of Columbia, Congress exercises "all police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Marijuana Policy Project*, 304 F.3d at 83, quoting *Palmore v. United States*, 411 U.S. 389, 397 (1973).

[8] The D.C. Circuit also found "no case . . . establishing that limits on legislative authority – as opposed to limits on legislative advocacy – violate the First Amendment." *Marijuana Policy Project*, 304 F.3d at 85. *Compare* Pet. App. 8a–10a (First Circuit finding no authority for same principle).

amount to prior restraint of the "core political speech" of a person who, although not one of the filers of the petition, nonetheless desired to have the initiative on the state ballot. *Id.* at 1052-53. The initiative proposed restrictions on abortion that the Oklahoma Supreme Court held would be unconstitutional and could not be on the ballot. *Id.* at 1052. When the state court's action was later challenged in federal court, the Tenth Circuit held that the plaintiff suffered no harm cognizable under the Free Speech Clause, finding that she had no "right to have a particular proposition on the ballot" and explaining that the state "had done nothing to restrict speech: neither Skrzypczak nor anyone else has been silenced by pre-submission content review." *Id.* at 1053.[9] *See also Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1211 (10th Cir.), *cert. denied*, 537 U.S. 814 (2002) (First Amendment does not require that initiative process "be granted to all political subdivisions or with respect to all subjects").

That three circuits have reached consistent results by somewhat different reasoning does not suggest that review in this Court is warranted. As explained above, the D.C. Circuit and the Tenth Circuit have held that laws or procedures that restrict the permissible subjects of citizen initiatives do not implicate Free Speech concerns at all. In the present case, the First Circuit "agree[d] with the D.C. Circuit that this type of regulation of a state initiative process is not aimed at regulating speech[,]" Pet. App. 11a, but viewed the Article 48 exclusions as having an "incidental" and "unintended" effect on speech

---

[9] After considering the constitutionality of the proposed initiative, the Oklahoma Supreme Court had similarly rejected the claim that pre-submission review of the constitutionality of initiative petitions violated the proponents' free speech rights. *In re Initiative Petition No. 349*, 838 P.2d 1, 9-10 (Okla. 1992), *cert. denied*, 506 U.S. 1071 (1993).

that justified subjecting them "at most . . . to intermediate scrutiny." Pet. App. 5a. All three circuits found no positive authority for petitioners' basic proposition – that a "state must provide an opportunity for its residents to propose constitutional amendments or laws on all subjects by means of an initiative process." Pet. App. 8a. *See Marijuana Policy Project*, 304 F.3d at 85; *Skrzypczak*, 92 F.3d at 1053.

2. Significantly, the First, Tenth and D.C. Circuits all concluded that *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), did not address, and therefore do not control, the issue here – whether the First Amendment precludes limitations on the subjects that the initiative lawmaking process, itself, may address. In *Meyer* the Court struck down Colorado's prohibition on using paid circulators to collect petition signatures, finding it unduly restrictive of petition proponents' right to engage in political speech. 486 U.S. at 420-28. For similar reasons, *Buckley* later struck down Colorado's requirements that initiative petition circulators be registered voters, that they wear identification badges, and that petition proponents report the names, addresses, and amounts paid to petition circulators. 525 U.S. at 197-204. As the First Circuit observed, the Article 48 exclusions regulate "the *act* of creating law," and so are distinct from "[l]aws such as those considered in *Meyer* and its progeny [which] were aimed at directly regulating the *means* that initiative proponents could use to reach their audience of potential petition signers." Pet. App. 8a.[10] By similar reasoning, the D.C. and Tenth Circuits found *Meyer* and *Buckley* inapposite. *See Marijuana Policy Project*, 304 F.3d at 86 (because *Meyer* and *Buckley* deal with

---

[10] *See Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003) (holding invalid statute requiring that signatures on petitions seeking to register a new political party be notarized by an attorney).

restrictions on petition circulators they "cast no light on the issue before us – whether a legislature can withdraw a subject from the initiative process altogether"); *Skrzypczak*, 92 F.3d at 1053 ("There is nothing in *Meyer* suggesting that there is a protected right to have a particular initiative on the ballot.").[11]

As explained above, the appellate courts have consistently rejected the Free Speech claim that petitioners advance and, in doing so, have relied largely upon the same general principles. Moreover, the courts of appeal uniformly, and correctly, reject that *Meyer* or *Buckley* mandate strict judicial scrutiny of provisions restricting the subjects that may be addressed in an initiative process. As such, petitioners do not demonstrate, as they must, a compelling reason for review in this Court.

---

[11] At least two other circuits have similarly viewed *Meyer* and *Buckley* as inapplicable to state laws that set requirements for measures proposed by initiative (or subjected to referendum). *See Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir.), *cert. denied*, 528 U.S. 870 (1999) (claim of violation of First Amendment right to petition government did "not fall within the orbit of *Meyer* and *Buckley*" because "plaintiffs do not challenge a restriction on their exercise of the referendum right . . . . Instead, plaintiffs seek to expand the scope of the referendum right itself."); *Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997) (*Meyer* "established an explicit distinction between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process. The Court only addressed the constitutionality of the latter.")

B. The Cases Petitioners Cite As In Conflict With the First Circuit's Decision Did Not Concern Subject Matter Limitations in a Citizen Initiative Process.

The decision below does not, as petitioners claim, conflict with decisions of the Eleventh Circuit, Sixth Circuit and the Maine Supreme Judicial Court. None of the cases that petitioners cite (Pet. 16-19) addressed the question that was considered by the First Circuit in this case – whether a state may limit the subjects that can be addressed in its citizen initiative lawmaking process.

Thus, in *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996), the plaintiffs challenged, under the Petition Clause of the First Amendment, Florida procedures permitting judicial review of the "legal sufficiency" of a citizen initiative to occur shortly before the election, claiming the delay created uncertainly that deterred citizen participation. (The state court had ruled, one month before the election, that the title of Biddulph's petition was misleading and violated the rule that initiatives address only a single subject.) In *Biddulph*, the plaintiffs did not complain of subject matter limitations in the initiative process, but instead sought, without success, an order requiring *earlier* state court review of petitions or a process for revision of petitions that are held defective. In *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), the "issue on appeal [was] whether the circulation of [an initiative] petition, written only in English, in designated bilingual political subdivisions violated § 203(c) of the Federal Voting Rights Act." *Id.* at 1490. After holding that the "clear language" of the Act does not require bilingual initiative petitions, *id.* at 1495, the court, in *dicta*, added that a contrary requirement – that citizens translate their initiative petitions into Spanish – could implicate First Amendment rights under *Meyer*. *Id.* at 1494-95.

Similarly, the cases petitioners cite from the Sixth Circuit and the Maine Supreme Judicial Court also did not address subject matter restrictions in an initiative process. In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), the court reviewed a challenge under the First Amendment to a state board's refusal to certify a proposed initiative after the board disqualified many petition signatures for failing to meet state requirements (*e.g.* the signer was not a registered voter or did not provide a complete home address). *Id.* at 293, 296-97. In *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993), the Maine Supreme Judicial Court held that the Maine Secretary of State violated the First Amendment in refusing to provide initiative petition forms to the plaintiff where, in the Secretary's opinion, the initiative would be unconstitutional if enacted. *Id.* at 309. The court noted that Maine law expressly required the Secretary to furnish such forms upon request, *id.* at 310, quoting 21-A M.R.S.A. § 901 (Secretary "shall furnish" petitions forms "to enable [a] voter to invoke the initiative procedure), and, accordingly, found no state interest supporting "executive oversight of the content of the petition prior to its circulation for signature . . . ." The court expressly did not consider the scope of the Secretary's statutory authority to determine, *after* signatures are gathered, the "validity" of initiative petitions. *Id.* at 310, n.6. The present case involves no claim that Massachusetts officials have closed the initiative process in violation of state law; rather, petitioners facially challenge limitations inherent in the scope of the initiative process as provided in the state constitution.

In sum, the cases cited by petitioners from the Eleventh and Sixth Circuits and the Maine Supreme Judicial Court did not involve subject matter restrictions on citizen initiatives; these cases addressed an assortment of other claims (only some of which arose under the First Amendment) concerning other aspects of particular States' initiative processes. Thus, it is

immaterial that the courts in these cases applied various levels of constitutional scrutiny to circumstances different from those here. Because these cases do not demonstrate a conflict at all, much less one that could be settled by a review of the present case, the Court should deny the petition.

II. The Petitioners' Equal Protection Claim Does Not Merit Review.

A. The Petition Does Not Identify an Important or Recurring Equal Protection Issue as to Which the Lower Courts Are in Conflict.

The petition also fails to satisfy the criteria for a grant of certiorari with respect to petitioners' Equal Protection challenge to the Article 48 exclusions. On this claim, petitioners do not argue that a decision by this Court will settle a conflict in the lower courts or that the case presents a significant and recurring question arising in any jurisdiction other than Massachusetts. Indeed, petitioners do not cite to any subject matter exclusions in the initiative processes of other States that are similar to the Anti-aid or religious institutions exclusions, and would therefore be affected by a decision of this Court on petitioner's Equal Protection claim.[12] On this basis, alone, review should be denied.

The arguments that petitioners do make also weigh strongly against review by this Court. Apparently conceding

---

[12] Thus, although petitioners' second question presented implies that a recurring issue is raised (by referring in the plural to "state constitutional provisions" that exclude initiatives relating to religion or to funding religious schools), the petition nowhere cites to provisions in other jurisdictions comparable to the Massachusetts exclusions, much less provisions that have been called into question.

that the Article 48 exclusions are facially neutral, petitioners urge that review should be granted to "correct" the First Circuit's analysis of whether the exclusions are neutral *in their operation*. Pet. 19–22. In this regard, petitioners mainly argue that the First Circuit misapplied – to the particular facts of this case – the Court's well-settled precedent governing "political restructuring" claims, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). Petitioners also assert that the First Circuit should have given more weight to their view as to the allegedly disparate impact of the exclusions and the motivation of the Massachusetts Constitutional Convention of 1917-1918. Pet. 24-25, 28-30. These issues are, however, unique to this case and suggest no justification for a grant of certiorari. Because review of petitioners' Equal Protection claim would not resolve an issue of broad importance and because, as explained below, the court of appeals faithfully applied this Court's settled precedent to uphold the Article 48 exclusions, this Court should deny review.[13]

B. The First Circuit Correctly Applied this Court's Precedents in Holding that the Article 48 Exclusions Do Not Violate the Equal Protection Clause.

The First Circuit correctly rejected petitioners' Equal Protection claims against the Anti-Aid exclusion and the religious-institutions exclusion because neither exclusion

---

[13] Although petitioners refer to both the Equal Protection and Free Exercise Clauses in their second question presented, the petition does not challenge the First Circuit's conclusion that the religious exclusion does not violate the Free Exercise Clause. *See* Pet. App. 13a-17a. Petitioners did not challenge the Anti-aid exclusion in the First Circuit under the Free Exercise Clause.

discriminates based on a suspect classification or burdens a fundamental right. Accordingly, each exclusion need only be supported by a rational basis, which the court of appeals "had no difficulty" finding. Pet. App. 24a. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (in equal protection cases, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"). In addition, because the First Circuit also held that the religious-institutions exclusion does not violate the Free Exercise Clause, petitioners' separate claim against the exclusion under the Equal Protection Clause, also based on allegations of religious discrimination, is subject only to rational-basis scrutiny. *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

Both of the challenged exclusions apply equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof. The Anti-Aid exclusion bars use of the initiative process to change any aspect of the Anti-Aid Amendment, whether related to religion or not, and thus does not classify based on religion. Similarly, the religious-institutions exclusion is neutral on its face and evenhandedly bars initiatives that would disfavor religion as well as those that might benefit religion. As the First Circuit concluded, the exclusions "simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs." Pet. App. 20a.

Petitioners based their Equal Protection claim on *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). These cases, however, are easily distinguished because they involved laws specifically intended to impose a disadvantage on a particular

minority group by restructuring the political process *solely* to make it more difficult to enact laws to *protect or benefit* that group. In *Hunter*, the Court struck down a city charter amendment requiring that any city council ordinance dealing with housing discrimination based on race, religion, or ancestry be submitted to the voters for approval before becoming effective. 393 U.S. at 385. The Court found that, although the charter amendment "on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination . . . ." *Id.* at 391. Likewise, in *Washington*, this Court struck down a state initiative law that was intended solely to bar local school boards from busing students to achieve racial desegregation. 458 U.S. at 457. "[D]espite its facial neutrality there is little doubt the initiative was drawn for racial purposes . . . . . [T]he text of the initiative was carefully tailored to interfere only with desegregative busing." *Id.* at 471. Because "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose," *id.* at 472, "'the reality is that the law's impact falls on the minority.'" *Id.* at 475 (quoting *Hunter*, 393 U.S. at 391).

Unlike the laws in *Hunter* and *Washington*, the Massachusetts exclusions plainly do not "evince[] a clear, solely detrimental effect on a suspect class." Pet. App. 21a. The religious-institutions exclusion precludes initiative measures that would disadvantage religious institutions *and* those that would benefit such institutions; thus, it does not create a classification limited to religious persons. *Cf. Crawford v. Board of Education*, 458 U.S. 527, 538 (1982) (distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters"). As the First Circuit explained, the provision "does not exclude religious people, or people of a

certain religion, from proposing laws or amendments." Pet. App. 14a. Rather, it prevents "*anyone* from proposing new laws or constitutional amendments relating to religion through the initiative process." *Id.* (emphasis added). Accordingly, the exclusion does not "discriminate on the basis of religious belief or status." *Id.*[14]

Similarly, the Anti-aid exclusion evenhandedly places beyond the reach of the initiative each and every part of the Anti-Aid Amendment – including its explicit guarantee of free exercise of religion (amend. art. 18, § 1) and its prohibition on aid to private schools, hospitals and institutions that are *not* religious as well as those that are religious (*id.* § 2). Thus, the exclusion bars a broad range of initiatives, including those that would impair the free exercise of religion or permit state aid to non-religious private schools while forbidding such aid to religious schools. Indeed, petitioners acknowledge that the exclusion "erects a barrier" for *anyone* who seeks public funding for *private* schools – which are, of course, both religious and non-religious. Pet 28.[15] Thus, the petition fails to show that the Anti-aid exclusion discriminates on the basis of religion or any suspect classification. Pet. 27–30. *See James v. Valtierra*, 402 U.S. 137 (1971) (declining to extend rationale of *Hunter v Erickson* where referendum requirement

---

[14] Moreover, as the First Circuit held in rejecting petitioners' Free Exercise claim, the religious exclusion does not burden or "prohibit any religious act or conduct." Pet. App. 15a. Petitioners do not challenge this conclusion in seeking review in this Court.

[15] *See* C.A. App. 699-700, 754-755 (respondents' affidavit documenting that 54% of Massachusetts private schools have a religious affiliation).

disadvantaged a group that sought public housing but did not implicate race or other suspect classifications).[16]

Finally, petitioners do not challenge the First Circuit's conclusion that the challenged exclusions "bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. Pet. App. 24a. The provisions serve various legitimate governmental interests. For example, the religious-institutions exclusion precludes initiatives that, while perhaps politically popular, might treat particular religious institutions, or such institutions generally, in a manner that violates the state or federal Free Exercise Clauses or might violate anti-Establishment guarantees. The Anti-Aid exclusion protects the compromise embodied in the Anti-Amendment from being too easily overturned by direct popular action, which might open the public treasury to the demands of any variety of private

---

[16] Even if petitioners had demonstrated that the exclusions, although neutral on their face, have a disproportionate negative impact on a suspect class, they would then have been required to prove that Massachusetts acted with discriminatory intent toward the class in enacting the exclusions. See Pet. App. 23a, citing *Hernandez v. New York*, 500 U.S. 352, 372-73 (1991). In this regard, petitioners seem to suggest that this Court should review the First Circuit's conclusion that petitioners failed to prove that the Massachusetts Constitutional Convention of 1917–1918 was motivated by religious animus when it passed the religious and Anti-aid exclusions. Pet. 24-25, 28-29. Review of this unique, fact-specific question would be particularly unwarranted. In any event, the First Circuit rightly concluded that the remarks petitioners submitted from a single delegate, *see* Petition 24-25, do not establish religious animus by Massachusetts Constitutional Convention, especially "given the significant Catholic representation at the Convention." Pet. App. 17a. *See* Pet. App. 23a (revision of Anti-aid Amendment in 1917 supported by 85 of 94 Catholic delegates and Anti-aid exclusion had "similarly broad support").

institutions (whether religious or not). This exclusion also protects from direct popular action the Anti-Aid Amendment's state constitutional guarantee of free exercise of religion. Both exclusions serve the general interest in reserving lawmaking on potentially difficult questions for careful consideration – and more flexible treatment – by the people's elected representatives.

There is no reason for review of this case, where the First Circuit carefully considered the full range of petitioners' equal protection claims, and particularly their arguments under *Hunter* and *Washington*, and correctly rejected them.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS F. REILLY
Attorney General
of Massachusetts

William W. Porter
Counsel of Record
Peter Sacks
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Date: December 22, 2005

2

No. 05-519

In The
Supreme Court of the United States

MICHAEL WIRZBURGER, ET AL.,

Petitioners,

v.

WILLIAM F. GALVIN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

RICHARD D. KOMER
Counsel of Record
WILLIAM H. MELLOR
DAVID E. ROLAND
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9329

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

OTHER PUBLICATIONS

I. INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute for Justice has defended or is presently defending the constitutionality of programs in Arizona, Florida, Illinois, Ohio, and Wisconsin that give parents greater freedom to send their children to the schools of their choice. In addition, the Institute has spearheaded efforts to expand parental choice programs in Maine and Vermont that exclude religious schools from the choices parents can make. Now that this Court has ruled in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), that the Establishment Clause allows parents to freely and independently select religious schools in a religiously-neutral school choice program, the opponents of such programs are forced to rely on state constitutional provisions that have been or can be interpreted to forbid payment of state funds to religious schools.

Virtually all of these provisions were enacted to preserve a public school monopoly over the expenditure of public educational funds, at a time when the public schools were generically Protestant in orientation. Their intended purpose was to prevent any equivalent funding of the Catholic schools, schools that arose in response to the Protestant Establishment's efforts to use the public schools to proselytize Catholic children. As such, they represent a grossly hypocritical and discriminatory attempt to undercut and destroy Catholic schools. The Massachusetts constitutional provisions at issue in this case are prototypical of such provisions, and their history unmistakably reflects their origins in religious prejudice. Like similar provisions in other states' constitutions, they serve to stymie efforts to promote

greater school choice for families dissatisfied with their local public school systems.[1] Elimination of the pernicious effects of such provisions is a core goal of the Institute for Justice in pursuit of enhanced educational opportunity for all.

II. INTRODUCTION

The ghosts of the Know Nothings are laughing. The nativist, viciously anti-Catholic political party secured one of its greatest political triumphs in the fall of 1854, when its candidates were overwhelmingly successful in taking over the state government of Massachusetts, winning the governorship and large majorities in both houses of the state legislature. The next year the Massachusetts Know Nothings began implementing their political platform, including restricting both the right to vote to those with twenty-one years of residence in this country and the right to hold office to native-born citizens, measures whose anti-immigrant animus is obvious. Less obvious on its face, but equally hostile to Massachusetts' substantial and growing immigrant Catholic minority, a constitutional amendment was successfully promoted by the Know Nothings that denied public funds for sectarian schools, reserving all

---

[1] Were these provisions interpreted to apply solely to direct aid to religious schools as their language states, their current effect would not be an impediment to school choice programs passing muster under the Establishment Clause. But the Massachusetts Supreme Court, like those in some other states, has expansively interpreted these provisions to preclude aid to families that freely choose to use religious schools, such as by providing tax deductions for educational expenses. See *Opinion of the Justices*, 401 Mass. 1201 (1987). See also *Bloom v. School Comm. of Springfield*, 376 Mass. 35 (1978) (program loaning textbooks to private school students violates the anti-aid amendment). Thus the discrimination against religious schools is extended to include the families who would use them, an extension not required by the Establishment Clause.

funds for the ostensibly "nonsectarian" public schools, which were in fact generically Protestant institutions.[2] In this the sesquicentennial year of the enactment of the amendment, the Know Nothings would rejoice that the federal courts below have refused to even consider "the shameful pedigree" of this amendment,[3] let alone strike it down.

While the Know Nothings evaporated as a political party in the lead-up to the Civil War, the anti-Catholic animus that drove them allowed their legacy to live on. In Massachusetts, as elsewhere in the United States, recurrent spasms of anti-immigrant and anti-Catholic prejudice welled up in a cyclical fashion.[4] These outbursts often involved hostility towards the Catholic parochial schools that had developed in reaction to the thorough-going but "nondenominational" Protestantism of the public schools. In Massachusetts, which had enacted the first compulsory attendance law in the United States in 1852, repeated efforts were undertaken to destroy the parochial schools, including a two-year long battle in the Massachusetts legislature in 1888-89.[5] This battle took the form of a

---

[2] See Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* (1987).

[3] As Justice Thomas observed in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for Catholic." The failed federal Blaine amendment of 1876 sought to replicate in the federal constitution the success the Know Nothings had achieved in several state constitutions in the 1850's, including in Massachusetts.

[4] John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1955).

[5] Jorgenson, *supra* note 2, at 159-186.

"school inspection bill" that interpreted the compulsory education law to require students to attend either a public school or "approved" private school, approved by the public school authorities. Conditions for such approval made it clear that this was a stratagem to eliminate the Catholic schools. While this effort ultimately failed after a compromise solution was reached, anti-Catholic sentiment in Massachusetts continued, albeit at a lower pitch. Nativists in the Massachusetts legislature continued to be dissatisfied with the limited scope of the 1855 anti-aid provision,[6] and each year, beginning in 1900, proposed expanding it from schools only to forbid aid to any sort of "sectarian" (read "Catholic") institution.[7]

The First World War triggered yet another wave of anti-Catholic animus, which in Massachusetts coincided with a constitutional convention that commenced in 1917. This convention produced two amendments relevant to this case: one, an extension of the original 1855 proto-Blaine amendment prohibiting aid to private religious schools[8] to encompass a ban on state aid to *all* religious

---

[6] For example, in 1849 the Massachusetts legislature had rejected a request for charter for a Jesuit college, Holy Cross College, in part because of fears that granting it would lead to requests for state funds, since such funds had been provided to many Protestant colleges. Jorgenson, *supra* n. 2, at 86-87. When Massachusetts finally granted a charter to Holy Cross in 1865, the law specified that "the granting of the charter should not be considered 'as any pledge of the Commonwealth that pecuniary aid shall hereinafter be granted to the college.'" *Id.* at 112 (*quoting* 1865 Mass. Acts ch. 99).

[7] I Debates of the Massachusetts Constitutional Convention 1917-18 at 182 (1918).

[8] While today the formulation "private religious schools" seems redundant, given that all religious schools must be private, it cannot be emphasized too often that by today's standards all public schools used to be "religious schools," and designedly so. This was true in Massachusetts,

(Continued on following page)

institutions, such as hospitals and orphanages, and two, an amendment that put the newly expanded prohibition off limits to the new initiative and referendum process allowing for greater citizen involvement in the passage of both legislation and constitutional amendments. Thus, the discrimination inherent in the 1855 amendment was compounded by both giving it a broader scope and making its removal more difficult. The District Court for Massachusetts and the First Circuit Court of Appeals have both failed in their duty to rectify this blatant discrimination against the Catholic religion and its adherents. This Court should grant the petition for certiorari to correct this longstanding and egregious religious discrimination.

III. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT THE FIRST AMENDMENT DEMANDS THE HIGHEST DEGREE OF CONSTITUTIONAL SCRUTINY FOR LEGISLATIVE PROHIBITIONS ON SPEECH RELATED TO BALLOT INITIATIVES.

This case also presents this Court with the question of whether a state that has empowered its citizens to amend

---

the birthplace of the Common School Movement, as elsewhere. These public schools were "nondenominational," which meant that while they did not teach doctrines specific to any Protestant sect, they did take a generic Protestant approach in their religious activities and textbooks. This approach led to resistance on the part of Catholics, who objected to the exclusive use of the King James Bible in the public schools, as well as to textbooks that openly disparaged Catholicism and Catholics. After losing most if not all of the battles over these issues in both state legislatures and the courts, the Catholic hierarchy determined to create, at enormous effort and expense, their separate parochial schools. Massachusetts' 1855 amendment served to preserve a monopoly on public funding for the Protestant "public" schools by denying equal treatment of the Catholic "private" schools. Jorgenson, *supra* n. 2.

the state Constitution directly, via ballot initiatives, may prevent the popular alteration of discriminatory constitutional status quos by creating content-based limitations on the power and forbidding the introduction of certain subjects for the approval of the state's voters.

The Constitution of the Commonwealth of Massachusetts permits citizens to amend that document when a sufficient percentage of the voting populace is persuaded that the ideas presented in a given ballot initiative are worthy of incorporation into the Constitution. Mass. Const. amend. art. XLVIII, pt. 1, definition. (Hereinafter "Initiative Amendment.") Another section of the Initiative Amendment, however, attempts to prevent certain popular challenges to the Constitutional status quo, prohibiting citizens from introducing ballot initiatives that would allow voters to decide for themselves how their government should best be ordered.[9] Mass. Const. amend. art. XLVIII, pt. 2, § 2. (Hereinafter, "Exclusions" or "Exclusionary Provisions.") As discussed above, the exclusions prohibiting amendment of the Constitution's religion-related provisions – including the Eighteenth Amendment's Anti-Aid requirement – were the product of anti-Catholic, anti-immigrant bigotry and intended to stave off popular efforts to gain equal treatment for religious

[9] In addition to forbidding amendments relating to religious matters and the state's anti-aid provision, section 2 of the Initiative Amendment prohibits citizens from adopting amendments that would affect the judiciary, permit local or special laws, appropriate state funds for a specific purpose, or which would conflict with any part of the declaration of rights. Section 2 also denies the power to modify any of the exclusions listed therein. We note that only the religious exclusions are at issue in the instant case, due to their peculiarly discriminatory intent and history. We express no opinion today about the various other exclusions provided for in the Initiative Amendment.

minorities. The content-based distinctions that Massachusetts created between these excluded subjects and any other subject on which a citizen might desire to effect legislative or constitutional change not only strikes directly at the ability of citizens to create an effective public discussion about the fundamental precepts by which the people will govern themselves, but also perpetuates a system designed to disadvantage religious groups that were in the minority at the time the Exclusions were adopted. Because these Exclusions prohibit purely political speech inextricably tied to the peoples' exercise of self-government, particularly as it is related to the attempted remediation of historically entrenched religious discrimination, the Commonwealth's blatant prohibition on this speech must satisfy this Court's highest scrutiny if it is to co-exist with the requirements of the First Amendment.[10]

The Commonwealth of Massachusetts has opened a purely democratic avenue through which its citizens may bypass the pitfalls, compromises, delays, and corruption that typify the traditional legislative process, permitting individuals to present their ideas for "political and social changes" directly to other voters to gain their approval or

---

[10] While this Court's decision in *Romer v. Evans*, 517 U.S. 620, 634 (1996), was based strictly on Fourteenth Amendment considerations, it bears comment that this Court has previously recognized the necessity of heightened judicial scrutiny where a state constitutional provision creates a "disadvantage ... born of animosity toward the class of persons affected." This principle is no less valid where the disadvantage is imposed upon religious minorities. Importantly, this Court recognized in *Romer* that an amendment intended to stave off efforts to remedy historical discrimination may still be invalid under the Federal Constitution even if the amendment pretends to maintain absolute neutrality. *See id.* at 626 (rejecting the State's argument that the challenged amendment merely "puts gays and lesbians in the same position as all other persons").

disapproval. The Massachusetts Supreme Court in *Buckley v. Sec'y of the Commonwealth*, 371 Mass 195, 199 (1976), expounded upon the purpose of Article 48 as follows:

> There can be no doubt that it created a peoples' process. It was intended to provide both a check on legislative action and a means of circumventing an unresponsive General Court. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures desirable without the danger of their will being thwarted by legislative action.

This articulation of the Initiative Amendment's fundamental purpose emphatically demonstrates that speech related to citizens' efforts to bring about legislative change under this section's provisions is unquestionably and inalterably the purest form of political discourse.

This Court has made clear that the essential purpose of the First Amendment is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . [T]he right freely to engage in discussions concerning the need for that change is guarded by the first amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). In *Meyer*, the state of Colorado had granted its citizens the power of initiative, but the legislature then attempted to impose significant restrictions on the peoples' efforts to exercise that power.[11] A group of citizens attempting to persuade Colorado voters to pass an amendment to the state Constitution sued,

---

[11] The statute at issue in *Meyer* made it a felony for supporters of a ballot measure to pay people to help gather the signatures necessary to get a proposal on the ballot. *See id.* at 417.

alleging that the legislature's attempt to limit the ways in which they could gather the signatures necessary for their issue to be placed on the ballot was unconstitutional. The Court struck down Colorado's restrictions, stating that, "[h]aving decided to confer the right [of initiative], the State [is] obligated to do so in a manner consistent with the Constitution." *Id.* at 420. Indeed, this Court explained in *Meyer* that "the importance of the First Amendment's protections is at its zenith" where a government attempts to interfere with speech related to ballot initiatives. *See id.* at 425. (Imposing upon Colorado's initiative-related restrictions a burden of scrutiny that was "well-nigh insurmountable.")

It is also worth noting that the petition restrictions involved in *Meyer* were struck down even though those restrictions did not prohibit the people from discussing and adopting any particular amendments based on their subject matter. The *Meyer* Court found strict scrutiny to be justified even where the restrictions on speech were arguably incidental. In contrast, the Exclusions at issue in this case directly forbid Massachusetts' citizens from considering or adopting certain amendments simply because of the subject matter therein. This Court has long made this sort of content-based distinction subject to strict scrutiny under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons

may speak . . . "); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Tinker v. Des Moines*, 393 U.S. 503, 513 (1969) (striking down content-based restriction of political speech). Under this Court's long-established hostility to content-based limitations on free speech and the *Meyer* Court's recognition that speech related to ballot initiatives warrants the highest protections of the First Amendment, it should be plain that the content-based Exclusions in this case *must* be subjected to the highest level of Constitutional scrutiny.

Furthermore, as petitioners discuss in their petition for certiorari, the First Circuit's decision in the instant case has created a three-way split among lower courts as to the level of scrutiny demanded by the First Amendment when a government uses content-based distinctions to restrict core political speech related to ballot initiatives. The Eleventh and Sixth Circuits and the Supreme Court of Maine have indicated that content-based restrictions on speech related to the initiative process would raise major First Amendment concerns. *See Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996) (strict scrutiny would be warranted where initiative regulations were content-based); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (limitations on ability to initiate legislation via initiative must be content-neutral); *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993) (restrictions on initiative efforts subject to exacting scrutiny, content-based restriction held unconstitutional). The D.C. Circuit, on the other hand, determined in *Marijuana Policy Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002), that the First Amendment was not implicated even

by direct, content-based censorship of political speech related to the initiative process, thereby refusing to apply any degree of scrutiny whatsoever to the restrictions imposed in that case. And in this case, even though the First Circuit recognized that the First Amendment was implicated by Massachusetts' Exclusionary provisions it merely applied intermediate scrutiny. *See Wirzburger v. Galvin*, 412 F.3d 271, 276-77 (1st Cir. 2005) (despite acknowledgement that petitioners' core political speech was being restricted, court believed case required "lower level of scrutiny"). This Court should take this opportunity to resolve the confusion and reaffirm its holding in *Meyer*, that because the purely political speech related to ballot initiatives is at the very core of the First Amendment's protections, the Constitution requires that the highest level of scrutiny be applied to governmental efforts to impose content-based restrictions on speech related to those initiatives.

IV. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE PROPER APPLICATION OF THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES TO STATE CONSTITUTIONAL PROVISIONS ADOPTED TO DISCRIMINATE AGAINST RELIGIOUS MINORITIES.

If Massachusetts had adopted its 1855 anti-aid amendment prohibiting provision of aid to sectarian schools because those schools were operated by and for African-Americans, this Court's precedents are clear: the enactment would be invalidated as a violation of the Equal Protection Clause.[12] Similarly, this Court would not hesitate

[12] While there may arguably be circumstances where religion in general or religious activities should be subjected to less than strict

(Continued on following page)

to strike down an enactment that made it more difficult to enact legislation benefiting African-Americans. In *Hunter v. Underwood*, 471 U.S. 222 (1985), this Court held unanimously that because a provision of the Alabama Constitution of 1901 that disenfranchised persons convicted of certain crimes had been adopted because it resulted in the disproportionate disenfranchisement of African-Americans, it violated the equal protection of the laws guaranteed by the Fourteenth Amendment. Its object was to discriminate against African-Americans, and its application had that effect. In this case, the anti-aid constitutional provisions at issue were adopted to deny public funds for Catholic schools and institutions, while continuing to fund Protestant public schools. Unless it is permissible under the Free Exercise and Equal Protection Clauses to single out one religion or sect for disfavored treatment, then the lower courts in this case should have invalidated these provisions as religiously discriminatory.

Although such blatant cases of religious discrimination have come before this Court only rarely, this Court has not hesitated to strike down the provisions involved. In the most recent of such cases, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court invalidated a city ordinance prohibiting the slaughter of animals under certain circumstances, an ordinance that was on its face religiously-neutral, finding

---

scrutiny, surely where one religion and its adherents are the deliberate target of acts motivated by religious animus, the justification of strict scrutiny review as necessary to protect "discrete and insular minorities" is present. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Indeed, *Carolene Products* suggested that particular *religious* minorities, as well as national and racial minorities, should be the subject for "more searching scrutiny." *Id.*

that in fact the ordinance was adopted to prevent the ritual animal sacrifice that is part of the Santeria religion. The ordinance violated the First Amendment's guarantee that even Santerians can freely exercise their religion and are entitled to the equal protection of the laws.

Massachusetts' anti-aid provisions were no less religiously motivated, and were adopted deliberately to undercut Catholic institutions in pursuit of Protestant hegemony. The evidence supporting this is *incontestable* with respect to the 1855 enactment,[13] and the Court of Appeals below states that the defendants did not dispute it. *Wirzburger v. Galvin*, 412 F.3d 271, 285 (1st Cir. 2005) ("Plaintiffs present evidence that widespread anti-Catholic prejudice was a motivating factor behind passage of the original Anti-Aid Amendment in 1855, a fact which defendants do not dispute").[14] Instead the Court of Appeals looks

---

[13] The Petition presents an excellent summary of the uncontroverted historical evidence that demonstrates that the original 1855 enactment was motivated by pervasive anti-Catholic animus, which needs no duplication here. This animus by the Protestant majority towards the Catholic minority did not magically dissipate in Massachusetts after 1855; if anything the increasing Catholic population appears to have exacerbated it as the minority's political power began to seriously threaten Protestant hegemony. See Jorgenson, *supra* n. 2, and Philip Hamburger, *Separation of Church and State* (2002).

[14] The Court of Appeals substantially understates what the historical record shows. Widespread anti-Catholic prejudice was far more than "a" motivating factor in adoption of the provision; it was plainly the primary motivating factor. See Jorgenson, *supra* n. 2; and Joseph Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," 21 *Harv. J.L. & Pub. Pol'y* 657 (1998). Massachusetts was the last state to abolish its established state religion of congregationalism, not doing so until 1833, only two decades before it passed the anti-aid amendment. Hamburger, *supra* n. 7, at 213. Anti-Catholic sentiment was rife in Massachusetts throughout the period leading up to the Civil War, periodically bursting into flame, literally in 1839 when a nativist mob incited by Boston Protestant clergymen

(Continued on following page)

to the changes made to the 1855 anti-aid provision by its 1917 amendment, which it describes as "largely overhauling it." *Wirzburger*, 412 F.3d at 285. That supposed "overhaul," which the Court of Appeals relies upon to ameliorate or dissipate the original discriminatory intent behind the provision, in fact *extended* its pernicious effects to encompass religious institutions in general, adding Catholic institutions such as hospitals, orphanages, and colleges to the Catholic schools previously excluded from state aid.[15] While the changes made to the provision retained all of its discriminatory impact on Catholic schools, the expansion to include institutions such as hospitals did allow some of those institutions to be compensated by government for services rendered, while preventing them from receiving grants-in-aid.[16]

Similarly, this court has several times invalidated legislation that made it more difficult for laws benefiting African-Americans to be passed. In *Hunter v. Erickson*,

---

burned the Ursuline Convent and school to the ground. Jorgenson, *supra* n. 2, at 29.

[15] In *Hunter v. Underwood*, Alabama argued that after the disenfranchisement provision was added to the state constitution, various events occurring after enactment had legitimated the provision by narrowing its scope through the elimination of various crimes as disqualification from voting. This Court rejected that approach as insufficient to remove the taint, since it did not suffice to show the provision would have been enacted without the discriminatory motivation. 471 U.S. at 233. In the case below, the Court of Appeals relied on the *expansion* of a discriminatory provision's discriminatory impact to find a dissipation of the original, concededly discriminatory intent.

[16] It may well be that here lies the explanation for why many of the Catholic members of the 1917-18 constitutional convention were induced to vote for adoption of the measure, a fact made much of by the Court of Appeals. *Wirzburger*, 412 F.3d at 285. If you are going to lose anyway, you may vote for a version that at least throws a scrap your way.

393 U.S. 385, 387-91 (1969), this Court invalidated a provision of the Akron, Ohio city charter that added the extra hoop of requiring voter approval for real estate ordinances regulating transactions "on the basis of race, color, religion, national origin or ancestry." The law made it more difficult to pass laws prohibiting racial (and religious!) discrimination and was struck down for doing so. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court likewise invalidated a Washington initiative that prohibited forced busing of schoolchildren, recognizing that the law was intended to hinder efforts to integrate African-Americans in the Seattle public schools.

In the case below, the pattern is stronger by far than in any of these cases involving race. The original enactment had the undeniable effect of discriminating against Catholic schools, and its amendment in 1917 had the undeniable effect of extending that discrimination to other Catholic institutions. In this context, the virtually simultaneous exclusion of the newly expanded discriminatory provision from the newly created initiative and referendum process establishing a procedurally easier means of amending constitutional provisions could not be more clearly an effort to freeze the discriminatory provision in place.[17]

---

[17] The Court of Appeals reasoned that unlike the exclusions in *Erickson* and *Seattle School District No. 1*, the Massachusetts exclusions do not "evince[ ] a clear, solely detrimental effect on a suspect class." *Wirzburger*, 412 F.3d at 284. This analysis borders on sophistry. The Court of Appeals believes that religious minorities benefit from the exclusion's preventing amendment of the Massachusetts free exercise clause, which is also contained in the anti-aid provision. *Id.* But at the time it was enacted what good was the Massachusetts free exercise clause, when it was already compromised by the next clauses that reserved all public funding for nondenominationally Protestant institutions? And what good is it now when direct aid to all religious

(Continued on following page)

The Court of Appeals asserts that "[n]o evidence has been offered that the exclusion [of the anti-aid amendment from the initiative and referendum process] was motivated by the same Anti-Catholic animus that impelled passage of the original Anti-Aid Amendment." *Wirzburger*, 412 F.3d at 285. The Court then accuses the plaintiffs of seeking to mix and match the intent behind the several amendments. In doing so, the Court turns a blind eye both to the evidence the plaintiffs offered concerning the discriminatory motivation behind the extension of the anti-aid provision and to the effects of the extension, which is patently to expand the discriminatory effects of the original enactment into areas other than elementary and secondary education. Given that the convention had just compounded the damage done to Catholic interests, the fact the convention then proceeds to make it substantially more difficult to ever reverse the damage strongly suggests that a single motivation underlies both acts. In the absence of some evidence of a contrary motivation, the convention can be safely presumed to have acted from the same motivation in enacting such closely related provisions.[18]

---

institutions is precluded by the Federal Establishment Clause? Today, all the exclusion protects from easier amendment are the anti-aid interpretations of the Massachusetts Supreme Court that go far beyond the Establishment Clause in prohibiting nondiscriminatory aid to individuals who might freely select religious providers for their children's elementary and secondary education.

[18] In *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), this Court held that a finding of intentional discrimination with respect to segregation in one portion of a school district created a presumption that segregation in other parts of the district was not adventitious and justified shifting the burden of proving a non-discriminatory motivation to the defendants. As this Court said in *Keyes*, "[t]his is merely an application of the well-settled principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful in

(Continued on following page)

Suppose that in *Hunter v. Underwood* a later Alabama constitutional convention had added additional criminal offenses to the list of offenses disqualifying felons from voting and that these additional offenses were known to add to the discriminatory impact on African-Americans. Suppose further that the convention also adopted a new referendum and initiative provision that contained a special exclusion exempting the amended voting disqualification article from the scope of the process. This Court would not hesitate for a second to impute to the new convention an ongoing racial motivation and shift to the state the burden of proving that a non-invidious motivation underlay the new provisions. The same result should apply here, where the only difference is that a disfavored religious minority was the object of such provisions.

The Court of Appeals paid lip service to the proper standard but failed utterly in its application of it. It stated that "[c]ertainly any form of invidious discrimination because of religion is forbidden," *Wirzburger*, 412 F.3d at 284, but held that the exclusion did not evince a clear, solely detrimental effect on a suspect class and that discriminatory intent had not been shown. Rather the First Circuit presumes that Massachusetts was pursuing the same basic policies as those underlying the federal Religion Clauses, which mandate that any system of public schools be religiously-neutral. The truth of the matter, however is far different, as one scholar has concluded:

---

reducing the possibility that the act in question was done with innocent intent.'" *Keyes*, 413 U.S. at 207 (*quoting* 2 J. Wigmore, *Evidence* 200 (3rd ed. 1940)). The Court of Appeals should have applied a similar analysis here, requiring the state to prove a non-discriminatory motive for putting the expanded Anti-Catholic anti-aid provision off-limits to the initiative and referendum process.

> American public education is pervaded by the myth that prohibition of public aid to non-public schools is a policy of constitutional origin. In fact, that policy was well established at the state level by 1860, a good century before the U.S. Supreme Court gave it constitutional status. As originally established by the leaders of the Common School Movement, the policy was not justified by any appeal to the abstract principle of separation of church and state. The argument of the common school leaders was simple and blunt: the growth of Catholicism was a menace to republican institutions and must be curbed. Catholic schools, as a contributing factor to the growth of the Church, must also be restricted and, if possible, suppressed.[19]

Put into the proper context of public schools that were unquestionably Protestant in orientation, Massachusetts' constitutional provisions precluding funding for Catholic schools and institutions and subsequently making modification or removal of that policy more difficult than other provisions cannot be regarded as benign. The anti-aid provisions did not establish the modern dichotomy between publicly-funded secular public schools and privately-funded religious private schools. Rather, they established a Protestant monopoly on public school funding for public Protestant schools, and eliminated the possibility of funding of comparable public schools for Catholics.[20] Not content with depriving Catholic schools of

---

[19] Jorgenson, *supra* n. 2, at 216.

[20] Beginning in 1835, the town school system in Lowell, Massachusetts incorporated two Catholic schools into the system. Catholics were appointed teachers in these schools, and no textbooks or exercises offensive to Catholics were used. By 1840, the system included five primary and one secondary school for Catholics. Jorgenson, *supra* n. 2,

(Continued on following page)

public funding, Protestants joined with various nativist organizations over the subsequent decades in efforts to force the closure of Catholic schools, even if that meant that the few secular or Protestant private schools were closed, too. Such efforts in Massachusetts were part of a nationwide assault on Catholic schools, which failed at the national level in 1925, shortly after the Massachusetts constitutional convention of 1917-18, when this Court ruled in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that parents had the right to send their children to private schools and that Oregon did not have the right to force all children to attend public schools.

It is only in recent times, with this Court's application of the Federal Constitution's Religion Clauses to the states and the subsequent interpretation of those Clauses to mandate religious neutrality in the public schools, that the religious favoritism towards Protestantism built into the public schools has been eradicated. That favoritism continued long after the adoption of the anti-aid amendment in 1855 and its extension in the convention of 1917-18. Throughout that time those provisions operated as they were originally intended to do so, to prefer Protestant interests over those of Catholics. It is impossible to know whether Massachusetts would reenact these provisions today were they to be invalidated based upon the original discriminatory motivation, but their "shameful pedigree"

---

at 73-74. Anti-Catholic agitation led to the cancellation of the cooperative arrangement, and the Catholics were forced to choose between attending inhospitable Protestant public schools or privately-funded Catholic schools. Catholic desire for comparable public funding of their schools led to passage of the anti-aid provision making it unconstitutional to accede to the Catholic requests.

cannot be ignored.[21] The exclusion of students in sectarian schools from otherwise permissible aid programs, "a doctrine born of bigotry," should indeed "be buried now."[22]

V. CONCLUSION

Amicus respectfully urges this Court to grant the Petitioners' request for a grant of certiorari.

Respectfully submitted,

RICHARD D. KOMER
Counsel of Record
WILLIAM H. MELLOR
DAVID ROLAND
INSTITUTE FOR JUSTICE
901 Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

Counsel for Amicus Curiae

---

[21] Obviously much of the effect of these provisions will remain as a result of the application of the Federal Religion Clauses to the states. Direct funding of religious schools will continue to be prohibited by the Establishment Clause. What would not remain, however, is the effect the interpretation of these provisions has on programs that pass muster under the Religion Clauses, but in which the Massachusetts Supreme Court has found a violation, such as textbook loan programs and tax deductions for educational expenses. See n. 1, *supra*, and the cases cited therein. In particular, the initiative petition submitted by the Plaintiffs below to permit the Commonwealth to provide loans, grants, or tax benefits to *students* attending private schools, including religious ones, would now be permitted.

[22] *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op. of Thomas, J.).

(4)

No. 05-519

IN THE

Supreme Court of the United States

MICHAEL WIRZBURGER, *ET AL.*,
Petitioners,

v.

WILLIAM F. GALVIN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
ERIC C. RASSBACH
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
Phone: (202) 955-0095

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE

Supreme Court of the United States

No. 05-519

MICHAEL WIRZBURGER, *ET AL.*,
Petitioners,

v.

WILLIAM F. GALVIN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

ARGUMENT

Massachusetts argues that review is inappropriate because the discriminatory structure established by the Anti-Aid Amendment and its entrenching Exclusions from ballot initiative is unique. But its component parts are not. The forerunners and successors of the nativist federal Blaine Amendment exist in over 30 state constitutions, and courts have struggled to reconcile them with federal prohibitions against religious discrimination. And there is a widening split over the level of First Amendment scrutiny applied to content-based carve-outs from ballot initiatives.

Indeed, to the extent the Massachusetts regime is unique at all, it is precisely those features that make review by this Court necessary. These provisions are self-

entrenching, subverting the political process so thoroughly that the ordinary avenues of democratic self-correction are closed off. It is in precisely these circumstances, where the citizens of Massachusetts have no recourse but to the federal courts, that their intervention is most needed.

1. With regard to the first question in the Petition—censorship of political expression in state initiative processes—Massachusetts admits that the lower courts lack a uniform standard for resolving this issue, conceding that at least "three circuits" have applied "different reasoning." (Br. Opp. 13). Nonetheless, Massachusetts seeks to whitewash this lower court disarray by asserting that there have been "consistent results" in the various cases. The "consistent results" Massachusetts discovers in the holdings of all three circuits and the Maine Supreme Judicial Court is the unremarkable idea "that the government may limit the subjects that can be addressed in citizen initiatives without violating the First Amendment." (Br. Opp. 11). But this is beside the point. Petitioners have never argued that government may not place *any* limits on the subjects addressed in a citizen initiative.[1] Rather, Petitioners have argued that those limits must be subject to strict scrutiny. As Massachusetts acknowledges, the Sixth Circuit, the Eleventh Circuit, and the Maine Supreme Judicial Court all apply strict scrutiny to this form of content discrimination. The First Circuit applied intermediate scrutiny in this case. And the D.C. Circuit applies no scrutiny.[2] The courts have

---

[1] This is contrary to Massachusetts' misleading characterization of "petitioners' basic proposition." (Br. Opp. 14) (quoting First Circuit's opinion rather than any argument advanced by Petitioners).

[2] Massachusetts points out that the circuit split is even wider than described in the Petition, as the Tenth Circuit also applies no scrutiny to this form of content discrimination. *See Skrzypczak* v. *Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996).

thus split over *applicable standards*, not "results" in individual cases.

This Court routinely grants certiorari to ensure that lower courts apply consistent standards. *See, e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 510 (2002) (certiorari granted to "resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases"). "Consistent results"—especially when very different standards are applied to very different facts—are simply not relevant. Massachusetts admits the split over the proper standard and the Court should take this chance to resolve it.

2. Massachusetts attempts to distinguish opinions by the Eleventh Circuit, Sixth Circuit, and the Maine Supreme Judicial Court[3] from this one by arguing that the standard they announced—strict scrutiny—was not actually applied in those cases. (Br. Opp. 16-18). But "the principle of *stare decisis* directs [courts] to adhere not only to the holdings of [their] prior cases, but also to their explications of the governing rules of law." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). All three courts situated the particular facts before them within a framework of law that explicitly requires strict scrutiny for content limitations on citizen initiatives. It is therefore of no moment that the courts in two of those cases determined that the facts fit into a different part of the acknowledged framework.

And in the third case—*Wyman*—the Maine Supreme Judicial Court *explicitly* stated that it was

---

[3] *Biddulph* v. *Mortham*, 89 F.3d 1491 (11th Cir. 1996), *Delgado* v. *Smith*, 861 F.2d 1489 (11th Cir. 1988), *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291 (6th Cir. 1993), and *Wyman* v. *Secretary of State*, 625 A.2d 307 (Maine 1993)

applying the First Amendment to content discrimination: "[the Secretary's] refusal to furnish the petition form *based on the content* of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment." *Wyman*, 625 A.2d at 311 (emphasis added). Massachusetts' claim that *Wyman* "did not address subject matter restrictions in an initiative process" is therefore disingenuous at best. (Br. Opp. 17). Moreover, *Wyman* was also similar to this case because the court held that the government could not cut off debate about a contentious social issue—civil rights protections for homosexuals—before it even started. *Wyman* at 311.

3. The central issue posed by Petitioners' second question is under what circumstances facial neutrality is insufficient to satisfy the constraints of the Free Exercise[4] and Equal Protection clauses. Rather than grappling with the issue presented, Massachusetts simply proclaims that facial neutrality is sufficient to pass muster under the neutrality analysis required by *Hunter* v. *Erickson*,[5] *Washington* v. *Seattle School District No. 1*,[6] and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*.[7] (Br. Opp. 20-21). Massachusetts is mistaken. The statute in *Hunter* was just as facially neutral as the Anti-Aid Amendment and Exclusions are. Nonetheless, the *Hunter* Court sensibly interpreted the statute in light of its context and held that the "law's impact falls on the minority." 393 U.S. at 391. Similarly, the Court in *Washington* used the well-known historical context to determine whether the facially neutral regulations were meant to "interfere only

---

[4] Massachusetts is wrong to state (Br. Opp. 19 n. 3) that Petitioners have not advanced a Free Exercise claim both here and in the First Circuit. (Pet. 19).

[5] 393 U.S. 385 (1969).

[6] 458 U.S. 457 (1982).

[7] 508 U.S. 520 (1993).

with desegregative busing." 458 U.S. at 471. Likewise, in *Lukumi*, this Court held that "[f]acial neutrality is not determinative," 508 U.S. at 535, and looked to the actual effect of the law, its lack of narrow tailoring, and the intent of the drafters in striking down a law based on lack of neutrality.

Here, Massachusetts has no response for Petitioners' many examples detailing how both the Exclusions' impact falls on religious minorities seeking to achieve beneficial legislation in the democratic process. (Pet. 23-26, 28-29, & n.14). Moreover, Massachusetts would have this Court ignore the historical context of the 1917-1918 Convention. No one disputes the long history of nativism in Massachusetts, or that anti-Catholic feeling was running high during World War I. Nor does anyone dispute that the vast majority of the private schools in Massachusetts in 1917 were Catholic schools. In short, "[n]o one suggests, and on this record it cannot be maintained, that [state] officials had in mind a religion other than [Catholicism]." *Lukumi*, 508 U.S. at 535. To assume from this historical context that the Convention's enactments were not meant to discriminate against Catholics is to ignore history.

Massachusetts compounds its error by mischaracterizing the historical record of anti-Catholic bias motivating both the Anti-Aid Amendment and the Exclusions during World War I. Massachusetts implies that Petitioners have relied on only a single remark by one member of the 1917-1918 Convention for the anti-Catholic nature of the Exclusions. (Br. Opp. 23 n. 16). But as Massachusetts well knows, Petitioners provided to both the trial court and the First Circuit a historian's—as yet uncontroverted—expert opinion that the Anti-Aid Amendment and Exclusions were motivated by anti-

Catholic bias. (Pet. App. 82a, 87a). Petitioners also provided other documentary evidence, such as newspaper reports from the time and history books discussing the period, all detailing the anti-Catholic nature of the Anti-Aid Amendment.

Both the trial court and the First Circuit glided over this disputed material fact issue, the First Circuit relying on the fact that several of the Catholic delegates at the Constitutional Convention voted for the Anti-Aid Amendment and the Exclusions. (Pet. App. 23a). It is more than passing strange that a court would see fit to use a Catholic public servant as a proxy for all Catholics or Catholic beliefs. That kind of identity politics is something this Court generally shies away from.

But even more disturbing is that the First Circuit's analysis is missing any context. As Petitioners demonstrated below, those Catholic delegates were not voting in a vacuum. To the contrary, they were fighting a political rearguard action to stop an even more virulently anti-Catholic version of the Anti-Aid Amendment from being enacted.

Beginning in 1900, nativists in the legislature each year proposed an "Anti-Sectarian Amendment" that would have expanded the Anti-Aid Amendment to prohibit funding of *any* institution under sectarian (*i.e.*, Catholic) control.[8] The 1917-18 amendments to the Anti-Aid Amendment grew out of these Anti-Sectarian Amendments, which were introduced during a period of resurgence of organized Anti-Catholicism, and were

---

[8] *See* I DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918 ("*Debates*") at 182.

sponsored by secret, religiously bigoted patriotic societies.[9] "[T]he underlying agenda [of the Constitutional Convention] continued to be the creation of uniformity of belief." (Pet. App. 82a). The Convention's consideration of the anti-sectarian amendment was also a reaction to growing Catholic power. As one delegate stated after election of a Catholic governor, "there were certain forces in the State that felt his election was a great menace, and so that helped to the securing of a following for this anti-sectarian amendment." *Debates* at 183.

The delegates who supported the new Anti-Aid Amendment saw themselves as completing the work left unfinished by their Know-Nothing predecessors in the 1850's.[10] To them, the 1853 Convention "lacked both in courage and in vision[.] ... They did not see how important it was to clear up this whole question, and they dealt only with public schools, leaving higher educational and charitable institutions entirely out of the question."[11] Like the Know-Nothings, they sought to preserve the "Americanizing" influence of public schools. *See Debates* at 71.

In addition, an alternative measure introduced by Delegate Anderson was a more virulent anti-sectarian amendment directed at Catholic institutions, targeting only appropriations to institutions under "sectarian or

---

[9] *See* ROBERT H. LORD, *ET AL.*, III HISTORY OF THE ARCHDIOCESE OF BOSTON 583 (1944); JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT 102 (1990).

[10] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERN OF AMERICAN NATIVISM, 1860-1925 at 62-63, 80-87 (1998).

[11] *See id.* at 159-160.

ecclesiastical control."[12] Anderson's measure "was supposed to embody the views of those who were especially desirous of preventing appropriations of public moneys to Roman Catholic institutions." *Id.* The measure that was adopted (and later enacted), which bars using public money to benefit any private institutions, was characterized by some as a compromise measure. However, the Archdiocese of Boston vigorously denounced this "compromise" as a "vicious faction ... impos[ing] its will upon the less violent adherents of the sect of anti-Catholicity." *An Unworthy Compromise*, THE PILOT, Sep. 22, 1917 at 1.

Catholics were forced to accept this so-called "compromise" under threat of having Mr. Anderson's anti-sectarian amendment aimed at the Catholic church imposed on them:

> Mr. Anderson[], who introduced the anti-sectarian resolution, said in the course of his argument that there were a hundred thousand minute-men who stood to advocate and advance his amendment. He told us that if we did not take this amendment he would give us the anti-sectarian amendment.

Debates at 209. This "compromise" measure did nothing to cut back on the discrimination inherent in funding public schools that had a mainstream religious bent, but continued to deny funding to private "denominational" religious schools. *Id.* at 71. In short, in light of this history, Petitioners' expert historian has concluded that "[t]he action of the Massachusetts Constitutional Convention in 1917-18 in adopting the 'Anti-Aid Amendment' was

---

[12] RAYMOND L. BRIDGMAN, THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917 at 23 (1923).

clearly motivated by a prejudicial understanding of the place of ethnic and religious minorities in order to impose a state-endorsed orthodoxy of beliefs and loyalties." (Pet. App. 87a).

In sum, the unrefuted evidence of discriminatory impact and discriminatory intent behind the Anti-Aid Amendment and its Exclusions provide this Court with an appropriate opportunity to clarify its neutrality analysis under the Free Exercise and Equal Protection Clauses.

4. Massachusetts also claims that its constitution is so unique that it does not merit this Court's attention. (Br. Opp. 19). This claim contradicts Massachusetts' own assertion before the First Circuit that "[o]f the twenty-three other states that have state-wide initiative processes, eleven have subject matter restrictions." (Appellees' Br. 10 n. 3). It also contradicts the fact that the number of proposed initiatives is increasing, as are attempts to limit initiative content. *See, e.g.*, Steve C. Briggs, *Colorado's Constitutional Contradictions*, DENVER POST, Apr. 6, 2003, at E01 (advocating limits on voter initiatives dealing with controversial social issues). And it ignores the fact that ballot initiatives occur at all levels of government and can be limited by state constitutions, statutes, municipal charters like the one in *Hunter*, and municipal ordinances. The Court needs no oracle to know that this issue will come before it again. This case provides it with an appropriate vehicle for setting the ground rules for future attempts to limit access to the democratic process in violation of the guarantees of the First and Fourteenth Amendments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
ERIC C. RASSBACH
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036-1735
(202) 955-0095
Counsel for Petitioners

January 19, 2005